Addison on Contracts.

A TREATISE

ON

THE LAW OF CONTRACTS



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CONTENTS.

BOOK I.

FORMATION AND INTERPRETATION OF CONTRACTS IN GENERAL.

CHAPTER I.

THE FORMATION OF CONTRACTS.

SECT. 2.—*Of the parties to contracts—continued.* PAGE

SECT. 2.—*Of the parties to contracts—continued.*

SECT. 3.—*Of the authentication of contracts.*

CHAPTER II.

THE INTERPRETATION OF CONTRACTS.

SECT. 1.—*General principles of interpretation.*

BOOK II.

THE LAW OF PARTICULAR CONTRACTS.

CHAPTER I.

THE CONTRACT OF LETTING.

CHAPTER II.

CONTRACTS FOR SERVICES.

CHAPTER III.

CONTRACTS OF SECURITY.

CHAPTER IV.

CONTRACTS OF INDEMNITY.

SECT. 2.—*Marine insurance—continued.*

SECT. 3.—*Fire insurance.*

SECT. 4.—*Life insurance.*

CHAPTER V.

MERCANTILE INSTRUMENTS.

CHAPTER VI.

CONTRACTS OF ASSOCIATION.

CHAPTER VIII.

THE CONTRACT OF SALE.

SECT. 2.—*Of contracts for the sale of goods and chattels—continued.* PAGE

BOOK III.

IMPLIED CONTRACTS.

CHAPTER I.

GENERAL PRINCIPLES.

BOOK IV.

STAMPS ON CONTRACTS.

CHAPTER I.

GENERAL PRINCIPLES.

CHAPTER II.

THE STAMPS APPROPRIATE TO PARTICULAR CONTRACTS.

BOOK V.

THE BREACH, AVOIDANCE, DISCHARGE, AND TRANSFER OF CONTRACTS.

CHAPTER I.

OF REMEDIES FOR BREACH OF CONTRACT.

CHAPTER II.

THE AVOIDANCE OF CONTRACTS.

CHAPTER III.

THE DISCHARGE OF CONTRACTS.

CHAPTER IV.

THE TRANSFER OF CONTRACTS.

APPENDIX.

INDEX OF CASES.

INDEX OF STATUTES.

ADDENDA.

Page 128. *Of the obligation of parents to provide for their children.* *Add*, see now Married Women's Property Act, 1882, sections 20, 21, in Appendix.

,, 455. Note (*p*), *Royce* v. *Charlton* is now over-ruled; see *Eaton* v. *Western*, 9 Q. B. D. 636, C. A.

,, 511. Note (*t*), *Kay* v. *Field* has been reversed on appeal; see Weekly Notes, December 2, 1882, p. 156.

,, 707. Note (*m*), *after* 6 Q. B. D. 648, *add*, affirmed 7 Ap. Cas. 670.

,, 825. Note (*s*), *Yorkshire Wagon Co.* v. *Maclure*, reversed on appeal, 21 Ch. D. 309.

,, 881. Note (*m*), *add Brewer* v. *Broadwood*, 22 Ch. D. 105; L. R. January Number, 1883.

,, 965. Note (*k*), *Ex parte Falk*, affirmed on appeal, see *Kemp* v. *Falk*, 7 Ap. Cas. 573.

,, 1117. Note (*x*), *add*, see now an important decision in the Court of Appeal, *Wallis* v. *Smith*, 21 Ch. D. 243.

,, 1147. Note (*a*), *Yorkshire Wagon Co.* v. *Maclure*, reversed on appeal, 21 Ch. D. 309; held contract not illegal, and both company and sureties liable.

,, 1319. Note (*z*), *add* see also *East & West India Dock Co.* v. *Hill*, 22 Ch. D. 14; L. R. January Number, 1883.

THE

LAW OF CONTRACT,

ETC.

BOOK I.

THE FORMATION AND INTERPRETATION OF CONTRACTS IN GENERAL.

CHAPTER I.

THE FORMATION OF CONTRACTS.

SECTION I.

KINDS OF CONTRACTS (DIVISION OF CONTRACTS).

Definition of a Contract.—A contract is defined by Pothier to be "an agreement by which two parties mutually promise and engage, or one of them only promises and engages to the other, to give some particular thing, or to do or abstain from doing some particular act." Every contract includes a concurrence of intention between two parties, one of whom promises something to the other, who on his part accepts such promise; but it does not necessarily include a mutuality or reciprocity of contract and liability. There must be two parties to every contract, a promisor or party making the promise, and a promisee or party to whom the promise is made; but there may be only one contracting party. When there is a mutual contract binding each party to the other, the contract is bilateral. When the contract binds one person to another without any engagement being made by the latter, it is unilateral. Contracts, also, are either principal or accessorial. The first are those which are entered into by the parties on their own account as principals; the second are those which are entered into for

assuring the performance of another principal contract, such as guarantees or engagements of sureties. Contracts, whether bilateral or unilateral, principal or accessorial, are made and authenticated either by parol, by deed, or by matter of record.

SUBSECTION I.

(1.) *Parol or simple contracts* are contracts which are either made by word of mouth, or are inferred from the silent language of men's conduct and actions, or are put into writing and signed by the parties to them, but are not sealed and delivered. Such contracts cannot be enforced unless they are founded upon some good or valuable consideration. Thus, in order to maintain an action for the breach of a promise or undertaking not under seal, the party making the promise must have acquired some right or received some benefit, or the party accepting such promise must have suffered some loss, or sustained some injury or inconvenience, in consequence of the making and acceptance of the promise. This rule has been wisely established by the law for the purpose of protecting weak and thoughtless persons from the consequences of rash, improvident, and inconsiderate engagements (*a*).

The consideration—Absence of consideration.—When, at the desire of the promiser, the promisee, or any other person, has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise (*b*). Gratuitous promises and undertakings, not clothed with the formalities prescribed by the civil law to render them legally binding, were termed by the civilians *nuda pacta* or *naked engagements*, and did not induce any legal rights; for it was thought better, we are told, to let such contracts rest upon the mere integrity and good faith of the parties who made them, than to subject them to the compulsory authority of the law (*c*). Bracton, who wrote in the time of Hen. 3, is the first of our lawyers who treats of naked promises and promises clothed with a consideration, and advocates, in the language of the civilians, the well-known principle, "*ex nudo pacto non oritur actio*" (*d*). In "Doctor and Student" it is observed, "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to build a house, or to do

(*a*) "Tantum meminerimus distinguendas esse promissiones serias, meditatas et utiles ab inconsideratis, temerariis atque inutilibus, cum quis non dispositive, ut loquuntur, nec serio, sed vel narrative, vel per jocum, et aliud agens, aliquid pronuntiat, ut ex illis tantum, non ex his, obligatio et actio oriuntur."—Vinnius, p. 661. *Eastwood* v. *Kenyon*, 11 Ad. & E. 450, 451. *Story* on Bailments, 120, 121.

(*b*) This is the definition of "consideration" given in the Indian Contract Act of 1872.

(*c*) Vin. Com. de Instit. 658, 659, ed. 1755. *Plowd.* 309, *a*.

(*d*) *Bracton*, lib. 3, cap. 1, fol. 99, ed. 1569.

him such certain service, and nothing is assigned for the money, for the building, or for the service. These be called naked promises, because there is nothing assigned why they should be made; and I think no action lieth in those cases, though they be not performed . . . . . Also, if I promise to another to keep him such certain goods safely to such a time, and after I refuse to take them, there lieth no action against me for it; for, if the promise be so naked that there is no manner of consideration why it should be made, then is a man not bound to perform it; for it is to suppose that there was some error in the making of the promise" (*e*). But if a man is entrusted with and receives money or goods on the faith of a promise to deal with them in a particular manner, an action can be maintained against him for any loss or injury that may be sustained by reason of a breach of the promise, although the duty or trust may have been undertaken gratuitously.

A promise to give any particular thing, such as a horse, or a colt, or a watch, to another, unaccompanied by an actual or constructive transfer or change of possession, is a mere *nudum pactum*, and cannot be enforced by compulsion of law (*f*). A promise by one man to pay a debt already incurred by another is a *nudum pactum;* and so also is a promise by a creditor to accept less than the full amount of an admitted debt, or to give time for the payment thereof (*g*); also a promise to pay money to a person not entitled to receive it (*h*); a promise by the heir to pay the bond of his ancestor, when the heir is not bound by the bond; a promise by a widow to pay her husband's debts, or to pay a note given by her when under coverture (*i*). And, where a specific sum is fixed as the price of goods sold and delivered, or as an agreed remuneration for work and services, a subsequent promise, without any new consideration, to pay an additional sum for the same work or the same services is a *nudum pactum* (*k*). Where, however, a man makes a representation on the faith of which another man alters his position, the man making the representation is bound to perform it, for in the eye of a Court of Equity it is a contract (*l*).

(*e*) Doct. and Stud. Dial. 2, chap. 24; *Shep.* Touch. 224, 225. *Elsee* v. *Gatward*, 5 T. R. 143, 148.

(*f*) *Donaldson* v. *Donaldson*, Kay, 718; *Milroy* v. *Lord*, 31 L. J. Ch. 798. By the civil law gifts were required to be publicly registered. Cod. lib. 8, tit. 54. Dig. lib. 42, tit. 8.

(*g*) *Fitch* v. *Sutton*, 5 East, 232; *Pinnell's case*, 5 Co. 117 a, 117 b.; *Cooper* v. *Phillips*, 1 C. M. & R. 649.

(*h*) *Clay* v. *Willis*, 1 B. & C. 364.

(*i*) *Barber* v. *Fox*, 2 Saund. 135, 137, h.; 1 Vent. 159; *Lloyd* v. *Lee*, 1 Str. 94; *Goodwin* v. *Willoughby*, Latch. 142; *Fabian* v. *Plant*, 1 Show. 178. But, as a promissory note given by a married woman as a security for advances made to her husband binds her separate estate, such a note is a good consideration for another note given by her after her husband's death for a balance then due, although the former note is barred by the statute of limitations. *La Touche* v. *La Touche*, 3 H. & C. 576; 34 L. J. Exch. 85.

(*k*) *Harris* v. *Watson*, Peake, R. 102. *Brown* v. *Crump*, 1 Marsh. 567; *Newman* v. *Walters*, 3 B. & P. 612.

(*l*) Per Bacon, V. C., in *Dashwood* v. *Jermyn*, 12 Ch. D. 781; citing *Hammersley* v. *De Biel*, 12 Cl. & F. 45, 61 n.,

A promise or agreement to make a duty of a limited nature more extensive, and to undertake a greater liability than is imposed by law upon the party making the promise, is a *nudum pactum*, unless there be some fresh consideration. The promise of an executor or administrator, for example, to pay the debt of his testator or intestate (*m*), does, in no degree, alter or extend his liability. The executor does not, by such a promise, render himself personally liable, but is only chargeable to the amount of his assets.

Neither "love and affection," nor "blood relationship" (*n*), nor "friendship," constitute a sufficient cause or consideration for the fulfilment by coercion of law of an undertaking or promise not under seal (*o*).

The performance of an act which the party is under a legal obligation to perform cannot constitute a good consideration for a promise. "If," for example, "a debtor, being bound by law to give up the title-deeds of an estate to a purchaser, pursuant to a decree of sale, enters into an agreement with the purchaser to deliver them to him on payment of a sum of money, the debtor is not only without any right of action for enforcing such an agreement, but, if the money is paid, he is himself subject to an action for the recovery of it back" (*p*). So, if a debt is released or discharged, the giving up of a deed or collateral security originally deposited with the creditor to secure the payment of the debt cannot form a good consideration for a promise; for, by the release of the debt, the security is released, and the creditor is no longer justified in retaining it (*q*). But the performance of an act a person has agreed with another to perform is a good consideration to support a promise by a third person, if the latter derives a benefit from the performance (*r*).

A promise to pay money to a sheriff in consideration of his executing a writ is also a *nudum pactum;* and so, also, is a promise to pay money to a witness regularly subpœnaed to give evidence at a trial, as a compensation for his loss of time; because, in each of these cases, the parties are bound by law to do the acts in question, without compensation or reward (*s*). It has been held, also, that a promise to pay money to the crew of a vessel, as an

and other cases, and see *post*, p. 207; *Estoppels in pais*, and *post*, p. 1133.

(*m*) *Pearson* v. *Henry*, 5 T. R. 6; *Kann* v. *Hughes*, 7 T. R. 350, n.; *Mitchinson* v. *Hewson*, ib. 348.

(*n*) *Tweddle* v. *Atkinson*, 1 B. & S. 393.

(*o*) *Herford* v. *Gardner*, 2 Leon. 30; *Holliday* v. *Atkinson*, 5 B. & C. 501; 8 D. & R. 163; *Cluff* v. *Moore*, 1 Sid. 413; *Lampleigh* v. *Braithwaite*, Hob. 105.

(*p*) *Pothier*, by Evans, p. 25.

(*q*) *Cowper* v. *Green*, 7 M. & W. 641.

(*r*) *Scotson* v. *Pegg*, 6 H. & N. 295; 30 L. J. Exch. 225.

(*s*) *Bridge* v. *Cage*, Cro. Jac. 103; *Willis* v. *Peckham*, 4 Moore, 300; *Collins* v. *Godefroy*, 1 B. & Ad. 956; *Dixon* v. *Adams*, Cro. Eliz. 538; *Jackson* v. *Cobbin*, 8 M. & W. 797; *Nokes* v. *Gibbon*, 26 L. J. Ch. 208.

incitement to exertion during a storm, is a *nudum pactum*, and cannot be enforced, because the sailor is bound to do his utmost to save and preserve the vessel (*t*); but if any extraordinary and additional services have been rendered beyond what the parties were in strictness bound to perform, there is a sufficient foundation for the promise, and the law will enforce its faithful performance (*u*). If, therefore, a vessel is so short-handed as to render it dangerous to life to proceed to sea, and the crew are not bound under their articles to sail with so small a complement of seamen, a promise of additional remuneration in consideration of the increased risk is valid and binding (*x*). A promise not to abuse the process of the law, as, for instance, to conduct proceedings in bankruptcy so as to avoid, as far as possible, injury to the debtor's credit, will form no consideration for a promise by the debtor (*y*).

Fraudulent consideration.—Corrupt or fraudulent considerations will not support a promise. Thus, where the defendants, in consideration of the plaintiff promising to obtain a contract from a company in relation to which he was in a position of trust, contracted to pay him a commission, it was held that he could not recover, for although the jury found that he had not been induced by such consideration to act corruptly, yet such consideration was in itself corrupt (*z*). So, also, as we shall see (*a*), illegal and immoral contracts, and such as are against public policy cannot be enforced, and this is sometimes because the consideration for the promise is bad, and sometimes although the consideration is good yet the promise is bad.

Sufficient considerations—Works and services.—By the civil law, if any one agreed to perform or effect anything on the understanding that another in his turn should do something, or give or deliver something, the person in whose favour the thing had been so delivered or done was not permitted to be deficient in performing what was stipulated on his part, but was compelled to performance, so that, if there was a cause or consideration *facti vel traditionis*, a corresponding obligation or duty arose. So, by the common law, if anything is performed or done which the party is under no legal obligation to perform or do at the request of the promisor, as the consideration or inducement for the promise whereby the promisor or party

(*t*) *Harris* v. *Watson*, Peake, 102; *Stilk* v. *Myrick*, 2 Campb. 317; 6 Esp. 129; *Newman* v. *Walters*, 3 B. & P. 615.

(*u*) *England* v. *Davidson*, 11 Ad. & E. 856.

(*x*) *Hartley* v. *Ponsonby*, 7 Ell. & Bl. 872; 26 L. J. Q. B. 322.

(*y*) *Bracewell* v. *Williams*, L. R. 2 C. P. 196.

(*z*) *Harrington* v. *Victoria Graving Dock Co.*, 3 Q. B. D. 549.

(*a*) *Post*, p. 1135.

making the promise has expected to obtain or secure for himself some benefit or advantage, or whereby the promisee or party to whom the promise has been made, has been expected to sustain some trouble or loss, or suffer some injury or inconvenience, there is a sufficient consideration to render the promise obligatory in law, and capable of sustaining an action. Thus, the mere surrender and delivery of a letter or other written document which the promisee has a right to keep and retain in his possession is a sufficient consideration for the promise, although the possession of it may turn out eventually to be of no value in a pecuniary point of view, or no benefit may have resulted to the one party, nor prejudice to the other, from the surrender and delivery of the document (*b*). If one person agrees to transfer, and another person agrees to accept, shares in a public company, upon which shares nothing has been paid, and which have no marketable value at the time of the transfer, the agreement constitutes a binding contract (*c*). If the defendant has promised the plaintiff to pay him a sum of money in consideration of the plaintiff's procuring a tenant for the defendant, or getting him a sale or purchase and conveyance of a particular estate, there is a good and valid consideration for the promise (*d*).

A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself. It is sufficient, if there be any damage or detriment to the plaintiff, though no actual benefit accrue to the party undertaking (*e*). If the plaintiff has become security for the promisor, or has accepted bills, or imposed upon himself any legal liability at the request of the latter, there is a sufficient consideration to support a promise and render it binding in law, although no actual benefit or advantage has resulted to the promisor (*f*). Any trouble or labour too, however slight, undertaken by the plaintiff at the request of the defendant, will support a promise by the latter, and render it binding, although such trouble and labour may have been unsuccessful, and productive of no benefit or advantage to the defendant (*g*). Where the defendant promised a reward to whoever would give such information as would lead to the conviction of a felon, and the plaintiff gave the necessary in-

(*b*) *Wilkinson* v. *Oliveira*, 1 Bing. N. C. 490; 1 Scott, 461; *Haigh* v. *Brooks*, 10 Ad. & E. 320, 334; 4 P. & D. 288; *Thomas* v. *Thomas*, 2 Gale & Dav. 226; *Westlake* v. *Adams*, 27 L. J. C. P. 271; 5 C. B. N. S. 248; *Smith* v. *Smith*, 13 C. B. N. S. 429.

(*c*) *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L. J. Ch. 784.

(*d*) *Seaman* v. *Price*, 1 Ry. & Mood. 195.

(*e*) *Bunn* v. *Guy*, 4 East, 194; *Jones* v. *Ashburnham*, ib. 466.

(*f*) *Bailey* v. *Croft*, 4 Taunt. 611; *Williamson* v. *Clements*, 1 Taunt. 523.

(*g*) *Sturlyn* v. *Albany*, Cro. Eliz. 67; *March* v. *Culpepper*, Cro. Car. 70.

formation, it was held that the service rendered was a sufficient consideration for the promise, and that the plaintiff was entitled to recover the reward, although he was a constable and police-officer of the district where the felony was committed (*h*). And, where the father of an illegitimate child promised the mother to pay her 2*s*. 6*d*. a week if she would abstain from affiliating the child, and the mother did abstain, it was held that the father was bound to make good the weekly payment (*i*). But a promise, on the abandonment of an immoral connexion with a woman, to pay her a sum of money, or an annuity, in consideration that she will thenceforth lead a good and virtuous life, is not binding (*k*).

Works and services rendered to a third party at the request of the promisor.—Any service, benefit, or advantage rendered to a third person at the request of the promisor is a sufficient consideration for the promise. Thus, if one person should say to another, "heal such a poor man of his disease," or "make an highway," and I will give thee so much, and he doeth it, an action lieth at the common law (*l*). A captain of a company of foot soldiers, at the request of the defendant, gave leave of absence to a soldier on the faith of a promise by the defendant that the soldier should return in ten days, or that the defendant would pay the captain 20*l.*; and it was held that the leave of absence so given was a sufficient consideration for the defendant's promise, and that the captain, consequently, was entitled to maintain an action for the breach thereof (*m*). So, where the defendant promised the plaintiff to pay him 100*l.*, if the plaintiff would bail the defendant's servant, who had been cast into prison, it was held that there was a sufficient consideration for the promise (*n*). Where the father of an illegitimate child promised to pay the mother an allowance of 60*l.* a-year during her life, in consideration that she had at his request undertaken, and then had, the care and nurture of the child, and would thenceforth continue to take charge thereof, it was held that there was a sufficient consideration for the promise, and that the executors of the father, after his decease, were bound to continue the payment of 60*l.* a-year to the mother (*o*). And, where the promise was to pay the mother 100*l.* a-year for life if she would

(*h*) *England* v. *Davidson*, 11 Ad. & E. 856; *Smith* v. *Moore*, 1 C. B. 438; *Thatcher* v. *England*, 3 C. B. 254; 15 L. J. C. P. 241; *Lockhart* v. *Barnard*, 14 M. & W. 674; 15 L. J. Exch. 1; *Turner* v. *Walker*, 6 B. & S. 871; L. R. 1 Q. B. 641; 35 L. J. Q. B. 179; S. C. affirmed on appeal, L. R. 2 Q. B. 301; 36 L. J. Q. B. 112; *Bent* v. *Wakefield Bank*, 4 C. P. D. 1.

(*i*) *Linnegar* v. *Hodd*, 5 C. B. 437; 17 L. J. C. P. 106; *Crowhurst* v. *Laverack*, 8 Exch. 213.

(*k*) *Binnington* v. *Wallis*, 4 B. & Ald. 650, Parke, B.; *Jennings* v. *Brown*, 9 M. & W. 501; *Beaumont* v. *Reeve*, 15 L. J. Q. B. 142.

(*l*) 1 *Rolle* Abr. Action sur case.

(*m*) *Taylor* v. *Jones*, 1 Raym. 312.

(*n*) *Hunt* v. *Bate*, Dyer, 272 a.

(*o*) *Jennings* v. *Brown*, 9 M. & W. 496.

bring up the child properly, and the mother did so, it was held that the annuity could not be withdrawn (*p*).

Past consideration.—Bygone acts or services (*q*) cannot be made a good consideration for a promise. A promise, for example, to pay the plaintiff 20*l.* in consideration that the plaintiff "had delivered" to the defendant twenty sheep, or a promise to lend the plaintiff 20*l.* in consideration that the plaintiff "had formerly lent" that sum to the defendant, is a *nudum pactum* and incapable of sustaining an action (*r*), for the thing having been done and executed before the promise was made cannot be said to be a consideration for it; but, if the act has been performed pursuant to the previous request of the party making the promise, then the promise is coupled to the consideration by the request, and is not a *nudum pactum* (*s*). Thus, where the plaintiff brought his action upon a promise made by the defendant to pay the plaintiff 20*l.* in consideration that the plaintiff, at the instance of the defendant, had taken to wife the cousin of the defendant, it was held that the action was maintainable, although the marriage was executed and past before the undertaking and promise were made, because the marriage ensued at the request of the defendant (*t*). So, where the defendant, having feloniously slain one Patrick Mahume, "required the plaintiff to endeavour to obtain a pardon for him from the king, and the plaintiff journeyed and laboured, at his own charges and by every means in his power, to effect the desired object, and the defendant, afterwards, and in consideration of the premises, promised to give the plaintiff 100*l.*, it was held that, although the consideration was past and gone before the promise was made, yet, inasmuch as the consideration was moved by the previous suit or request of the party," the promise was binding and capable of sustaining an action (*u*). But the thing done must, of course, have been advantageous to the defendant, or detrimental or troublesome or inconvenient to the plaintiff, and must be such an act or service as the law recognises as a legal consideration for a promise (*x*).

If a man pays a sum of money or buys goods for me without my knowledge or request, and afterwards I agree to the payment or receive the goods, this subsequent assent is equivalent to a previous request, in accordance with the ancient maxim of

(*p*) *Hicks* v. *Gregory*, 8 C. B. 383; 19 L. J. C. P. 81; 7 C. B. 716.

(*q*) But where there is a request and an act done in pursuance thereof, that is sufficient to support a subsequent promise, see *infra*.

(*r*) *Jeremy* v. *Goochman*, Cro. Eliz. 442; *Doggett* v. *Vowell*, Moore, 643; ib. 220; Bacon's Abr. Assumpsit, D.; *Eastwood* v. *Kenyon*, 11 Ad. & E. 451.

(*s*) 1 Wms. Saund. 264.

(*t*) Dyer, 272, b.; 1 Wms. Saund. 264, 264 a.

(*u*) *Lampleigh* v. *Braithwait*, Hob. 105, 1 Sm. Lead. Cas.; *Sidman* v. *Worthington*, Cro. Eliz. 42; *Harris' case*, Dyer, 272, a, n. 31.

(*x*) *Kaye* v. *Dutton*, 13 L. J. C. P. 187; 7 M. & Gr. 816; *Victors* v. *Davies*, 12 M. & W. 759.

the civil law, *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (y). A request, too, is frequently implied by law for the purpose of enabling a man to enforce an express promise founded upon a meritorious claim not amounting to a strict legal right. If a man, for example, clothes, feeds, and educates an infant during his infancy, and the latter, after he comes of age, makes an express promise to his benefactor to pay him a certain sum of money in consideration of the benefits so rendered, the law will imply a previous request (z) on the part of the infant for the supply of the necessaries of life so furnished.

When the defendant has received and retains the benefit of the consideration, the law will, under some circumstances, imply a request, or permit the jury to infer it, for the purpose of enforcing a meritorious claim (a).

Failure of consideration.—Although there be an apparent consideration for the promise, yet, if this consideration should turn out to be false, or to be a nullity, the contract has no legal force or effect, as in the instance put by Pothier. "If, upon the false supposition that I owe you 1000*l.*, left you by the will of my father, which has been revoked by a codicil, whereof I am not apprised, I engage to give you a certain estate in discharge of that legacy, the contract is null; and the falseness of the cause being discovered, you are not only without any right of action to compel me to deliver the estate, but, even if I have delivered it, I am entitled to reclaim it; and my right of action by the Roman law was called *condictio sine causâ*, which is the subject of the title in the digest" (b). So, if the consideration prove to be a nullity, the promise founded upon it is void, as if the consideration be the forbearance of a suit when there is no cause of action, or the relinquishment of a contract void in law, or a discharge from an arrest wrongfully and illegally made, or a promise to pay a debt which never had an existence in point of law (c).

Written promises without consideration.—No superiority was given by the civil law to a written contract over a contract by word of mouth. "For writing cannot change the nature of it, neither can writing amount to a cause or consideration for the promise, but is only made use of for proof" (d). Where the defendant signed a written undertaking to the following effect, "I hereby agree to

(y) 1 Saund. 264, n. 1.
(z) *Cooper* v. *Martin*, 4 East, 81.
(a) *Post*, bk. 3, ch. 1.
(b) Pothier on Obligations, p. 1, c. 1, art. 3, § 6; *Gough* v. *Findon*, 7 Exch. 48.
(c) *Rosyer* v. *Langdale*, Sty. 248; *Hammon* v. *Roll*, March. 202; *Atkinson* v. *Settree*, Willes, 482; *King* v. *Hobbs*, Yelv. 25; *Randal* v. *Harvey*, Godb. 358; *Courtenay* v. *Strong*, 2 Ld. Raym. 1217; *Cockrane* v. *Willis*, L. R. 1 Ch. 58; 35 L. J. Ch. 36.
(d) Dig. lib. 2, tit. 14, 7; lib. 44, tit. 7. 61; lib. 22, tit. 4. 4; Cod. 4, tit. 30; *Rann* v. *Hughes*, 7 T. R. 350, 351 n.

remain with Mrs. Lees for two years from the date hereof for the purpose of learning the business of a dressmaker, &c.," it was held that, as the engagement was all on one side, nothing being contracted to be done or performed by Mrs. Lees as a consideration or inducement for the defendant's remaining two years in her service, it was a *nudum pactum* (e). So, where a memorandum of agreement was made in the following terms, "I, William Bradley, of Sheffield, do agree that I will work for and with John Sykes, of Sheffield, manufacturer of powder-flasks, at such work as he shall order and direct, and no other person whatsoever, from this day henceforth during and until the expiration of twelve months, and so on from twelve months' end to twelve months' end, until I shall give the said John Sykes twelve months' notice in writing that I shall quit his service," it was held that the agreement was a *nudum pactum*, and could not be enforced (f).

Moral obligations.—The moral obligation which a parent is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and he cannot be made liable in respect thereof, unless he has given the child authority to incur them, or has contracted to pay them (g), or the child has become chargeable upon the parish, and the parish authorities sue for subsistence money in the mode provided by the poor laws. Very slight evidence has, however, been held sufficient, under certain circumstances, to warrant a jury in inferring the existence of an authority from the parent, so as to fasten a just liability upon the latter. If a tailor furnishes clothes to a boy at school, and the father sees the clothes on the boy's return home, and makes no objection to the tailor, this is sufficient to warrant a jury in finding that there was an implied authority from the father to the tailor to furnish the son with clothes (h). The only duties of the nature of mere moral obligations that will support an express promise are those which could be enforced at common law but for the intervention of some positive rule of law or statutory enactment, which, with a view to the general benefit, exempts the party in that particular instance from liability. Such are

(e) *Lees* v. *Whitcomb*, 2 Moo. & P. 86; 5 Bing. 34.

(f) *Sykes* v. *Dixon*, 9 Ad. & E. 693; 1 P. & D. 463; *Bates* v. *Cort*, 3 D. & R. 676; *James* v. *Williams*, 5 B. & Ad. 1109; *Young* v. *Timmings*, 1 Cr. & J. 340; *Hulse* v. *Hulse*, 17 C. B. 725; 23 L. J. C. P. 177; but see *Pilkington* v. *Scott*, 15 M. & W. 657, and *Whittle* v. *Frankland*, 2 B. & S. 57. Probably at the present day an agreement to employ and retain would be inferred from the terms of the contract where they were not actually inconsistent with such a promise. See *Hartley* v. *Cummings*, 17 L. J. C. P. 84; *Reg.* v. *Welch*, 2 El. & Bl. 355; 22 L. J. M. C. 145.

(g) *Mortimore* v. *Wright*, 6 M. & W. 482; *Seaborne* v. *Maddy*, 9 C. & P. 497; *Urmston* v. *Newcomen*, 4 Ad. & E. 899; 6 N. & M. 454; *Shelton* v. *Springett*, 11 C. B. 452; *Ruttinger* v. *Temple*, 33 L. J. Q. B. 1.

(h) *Law* v. *Wilkin*, 6 Ad. & E. 718; 1 N. & P. 697; *Baker* v. *Keen*, 2 Stark. 501; *Blackburn* v. *Mackey*, 1 C. & P. 1.

the duties and obligations arising out of the debts and contracts of persons under age, and antiquated legal claims and demands barred by the Statute of Limitations, where the remedy is taken away by a positive rule of law, or by express legislative enactment, and the payment of the debt, or the performance of the engagement, remains a voluntary duty, binding only *in foro conscientiæ*. In these instances, and upon such duties and obligations so exempted, an express promise operates to revive the liability and take away the exemption. It revives a precedent good consideration; but it can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statutory provision (*i*). Thus, a bill of exchange given after the repeal of the usury laws, in renewal of a bill given before such repeal to secure the repayment of usurious interest, is valid (*k*).

Forbearance of legal or equitable rights forms a good consideration for an undertaking, and will make it binding (*l*), and this even though no actual benefit accrue to the party undertaking. If the plaintiff, for example, at the request of the defendant, forbears to institute legal proceedings, or discontinues legal proceedings already commenced, against a third party for the enforcement of a lawful claim or demand, for any convenient or reasonable period, or suspends or withdraws an execution or a distress against the goods or the person of such third party, the suspension or withdrawal of such execution or distress, or the forbearance of further proceedings, forms a sufficient consideration for a promise by the defendant to pay money to the plaintiff, or to satisfy the full amount of his claim (*m*). The abandonment and discontinuance of an action brought to enforce a doubtful right or claim are a sufficient consideration for a promise (*n*); and so is the compromise of a disputed claim made *bonâ fide*, even although it ultimately appears that the claim was wholly unfounded (*o*); and, if there be an admitted debt due from one person to another, but disputes and doubts exist as to the exact amount due, the compromise and settlement of the disputes, and the abandonment of the claim to

(*i*) *Wennall* v. *Adney*, 3 B. & P. 249, n. a. *Eastwood* v. *Kenyon*, 11 Ad. & E. 447.

(*k*) *Flight* v. *Reed*, 1 H. & C. 703; 32 L. J. Exch. 265.

(*l*) *Alliance Bank* v. *Broom*, 2 Drew. & Sm. 289; 34 L. J. Ch. 256; *Bracewell* v. *Williams*, L. R. 2 C. P. 196.

(*m*) *Smith* v. *Algar*, 1 B. & Ad. 603; 1 Roll. Abr. 24, pl. 33; *Morton* v. *Burn*, 7 Ad. & E. 19; *Pilkington* v. *Green*, 2 B. & P. 151; *Sugars* v. *Brinkworth*, 4 Campb. 46.

(*n*) *Longridge* v. *Dorville*, 5 B. & Ald. 117; *Stracey* v. *Bank of England*, 4 M. & P. 639; *Llewellyn* v. *Llewellyn*, 15 L. J. Q. B. 4. But not the abandonment of a suit, when the plaintiff knows and has admitted that he had no cause of action at all; *Wade* v. *Simeon*, 15 L. J. C. P. 114.

(*o*) *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; 39 L. J. Q. B. 181. See however, *Ex parte Banner*, 17 Ch. D. 480, per Brett, L. J.

its full extent, form a sufficient consideration for a promise to pay a smaller sum than the amonnt claimed (*p*); and, in the case of all unliquidated claims and demands, where the precise amount due has not been fixed and reduced to a certainty by the agreement of the parties, the payment or satisfaction of part of the demand is a good consideration for the discharge of the residue (*q*), although litigation has not been actually commenced (*r*). But unless the debt is unliquidated, or some doubt exists as to the exact amount due, a promise by the creditor to discharge the residue on receiving payment of part is *nudum pactum* and totally inoperative (*s*), because the debtor is under a legal obligation to pay the whole demand. As a husband has the power of immediately enforcing in a joint action a claim of the wife which accrued to her before the marriage, forbearance by him from so doing is a sufficient consideration to support a promise made to him alone (*t*). But the mere putting an end to "certain disputes and controversies," or ceasing to make complaints, or to bore or annoy a man, is an insufficient consideration or foundation in law for an express promise (*u*).

Adequacy of consideration.—From the preceding remarks it will be perceived that the consideration for a simple contract or promise need not be adequate in point of value. "If there be *any* consideration, the court will not weigh the extent of it" (*x*). It has no means of scrutinizing the varied hidden motives and reasons that may have influenced the parties, and induced them to enter into the contract, nor can it determine upon the prudence or propriety of the transaction. If parties choose to enter into unwise and improvident bargains, they must abide by the consequences of their own rashness and folly; they have contracted for themselves, and the court cannot contract for them (*y*).

Thus in the case of guarantees:—"Suppose I say, if you will furnish goods to a third person, I will guarantee the payment; there, you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me upon my guarantee" (*z*). So, if a person says, "In case you choose to

(*p*) *Edwards* v. *Baugh*, 11 M. & W. 641; 12 L. J. Exch. 427.

(*q*) *Wilkinson* v. *Byers*, 1 Ad. & E. 113; *Watters* v. *Smith*, 2 B. & Ad. 889.

(*r*) *Cook* v. *Wright*, 1 B. & S. 559; 30 L. J. Q. B. 321.

(*s*) *Cumber* v. *Wane*, 1 Str. 425.

(*t*) *Rumsey* v. *George*, 1 M. & S. 180.

(*u*) *Edwards* v. *Baugh*, 11 M. &. W. 641; *Kaye* v. *Dutton*, 7 M. & Gr. 807; 8 Sc. N. R. 502; *White* v. *Bluett*, 23 L. J. Exch. 36.

(*x*) *Ellenborough*, C. J. 16 East, 372; *Hitchcock* v. *Coker*, 6 Ad. & E. 457; *Starlyn* v. *Albany*, Cro. Eliz. 67; 2 H. Bl. 312; *Pinnell's case*, 5 Co. 117, a. 117 b.

(*y*) But the consideration must be of some value. *Smith* v. *Smith*, 3 Leon. 88; 1 Rol. Abr. 23. See as to the rule in equity, *Townend* v. *Toker*, L. R. 1 Ch. 446, 458; 35 L. J. Ch. 608, 614; *Cheale* v. *Kenward*, 3 De G. & J. 27; 27 L. J. Ch. 784.

(*z*) *Morton* v. *Burn*, 7 Ad. & E. 23.

employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you," the party indemnified is not therefore bound to employ the person designated by the guarantee; but, if he does employ him, then the guarantee attaches and becomes binding on the party who gave it (*a*). So where a railway company advertised for tenders for the supply of stores for a period of twelve months, and the defendant sent in a tender to supply the stores "in such quantities as the company's store-keeper might order from time to time," and the company accepted the tender, it was held that the defendant was bound to supply goods ordered before any notice had been given by the defendant to the company of withdrawal of the tender (*b*). In these cases there is an offer which is intended to be accepted by the other party doing the act, which forms the consideration; and when the defendant has had the benefit of the consideration for which he bargained, it is no answer to an action brought against him to say that the plaintiff was not bound by the contract to do the act (*c*). But it does not follow that, because a householder applies to a gas company for a supply of gas, and is promised a supply, and fits up his premises with stoves and fittings for the purpose of having them warmed and lighted with gas, there is any contract on the part of the company to supply, or on the part of the householder to consume and pay for, gas any longer than either of them may think fit. The householder is not bound to take gas, nor the company to supply it, for a single minute longer than each is minded so to do (*d*). So an advertisement of a sale by auction does not amount to a contract with any one who may act upon it that all the things advertised will actually be put up for auction, and that such person will have an opportunity of bidding for them. It is a mere declaration of intention, and not an offer; and persons who attend the sale cannot maintain an action against the auctioneer, if the articles advertised are not put up for sale (*e*).

Bilateral contracts, also, being founded upon mutual promises, are perfected and made binding by the bare consent of the parties, the promise or undertaking of the one party to do one thing being the consideration for the promise of the other to do another. Such are all contracts of sale, where the promise or undertaking of the one party to sell forms the consideration for the promise of

(*a*) *Kennaway* v. *Treleavan*, 5 M. & W. 501; *Offord* v. *Davies*, 12 C. B. N. S. 748; 31 L. J. C. P. 319.

(*b*) *Great Northern Ry. Co.* v. *Witham*, L. R. 9 C. P. 16.

(*c*) Tindal, C. J., 6 Sc. N. R. 106; *Jones* v. *Robinson*, 1 Exch. 454; 17 L. J. Exch. 36; *Mills* v. *Blackall*, 11 Q. B. 358; 17 L. J. Q. B. 31; 12 Jur. 93. Traité des Obligations, part 1, ch. 1, art. 3, s. 7.

(*d*) *Haddcsdon Gas Co.* v. *Hazelwood*, 6 C. B. N. S. 249; 28 L. J. C. P. 268.

(*e*) *Harris* v. *Nickerson*, L. R. 8 Q. B. 286.

the other to buy, and where the "bargain is struck," and the contract concluded, by the mere assent of the parties (*f*). Such, also, are all agreements by simple contract between creditors for compounding their debts and releasing their debtor from their several claims, on receiving a part only of the amount due to them, the agreement by one to compound his debt and release the debtor being the consideration for the agreement of the other to do the same (*g*); also all contracts of marriage, where the promise of the one party to marry is the consideration for the promise of the other party; also all contracts or agreements to enter into partnership, or to make exchanges of lands and chattels, or to refer disputes to arbitration (*h*); and, whenever several parties simultaneously agree for the performance of several duties or services to or for the benefit of each other, there is a binding contract, and an action will lie (*i*). By-laws for the government of corporations are binding upon all persons who consent to become members of the corporation, as being in the nature of a contract founded upon mutual promises (*k*). All contracts founded upon mutual promises between persons of full age must be obligatory upon both parties (*l*), so that each may have an action upon it, or neither will be bound. A written agreement, therefore, to submit disputes and differences to arbitration must be signed by all parties before any one can be made liable upon it, as the obligation by all to obey the award of the arbitrator is the consideration to each for his entering into the contract; and, before a plaintiff can succeed in an action upon such a contract, he must show that he had himself engaged to be bound by the award (*m*). The mutuality of obligation is the very essence of all contracts founded upon mutual promises. "Hence it follows," observes Pothier, "that nothing can be more contradictory to such an obligation than an entire liberty in either of the parties making the promise to perform it or not, as he may please. An agreement giving such a liberty would be absolutely void for want of obligation" (*n*), *i.e.*, so long as the contract remained wholly executory, and nothing had been done under it.

Assent of the parties.—In order to make a contract, there

(*f*) 2 Bl. Com. 447; Noy's Maxims, c. 42; Just. Inst. lib. iii., tit. 23.

(*g*) *Boothby* v. *Sowden*, 3 Campb. 175; *Wood* v. *Roberts*, 2 Stark. 417.

(*h*) *Gower* v. *Capper*, Cro. Eliz. 543; *ib.* 703, 888; *Mansfield* v. *Stephen*, Comb. 256; *Hebden* v. *Rutter*, 1 Sid. 180; *Holder* v. *Dickeson*, 1 Freem. 95; *Gibbons* v. *Prewd*, Hardr. 102.

(*i*) *Tipper* v. *Bicknell*, 4 Sc. 462; 3 Bing. N. C. 710.

(*k*) *Tobacco Pipe, &c., Co.* v. *Loder*, 16 Q. B. 765; 20 L. J. Q. B. 414.

(*l*) *Nichols* v. *Raynbred*, Hob. 88 *Sutcliffe* v. *Brooks*, 14 M. & W. 855.

(*m*) *Kingston* v. *Phelps*, Peake, R. 299; *Biddle* v. *Dowse*, 6 B. & C. 255. An action will lie on a judge's order to refer made by consent, the consent being evidence of an agreement to perform the award. *Lievesley* v. *Gilmore*, L. R. 1 C. P. 570; 35 L. J. C. P. 351.

(*n*) *Holt* v. *Ward Clarencieux*, 2 Str. 938. *Pothier*, Obligations, part 1, art. 4. The same rule prevails in the civil and French laws.

must be an offer or proposal made by the one party to the other, an acceptance of that offer or proposal, and, unless it was clearly not required by the proposer in the first instance, there must be a communication of such acceptance. If the terms of a contract founded upon mutual promises have not been finally agreed upon, if either party withholds, or has not given, his full assent to them, the contract is incomplete; it binds neither of the parties, and can give rise to no cause of action (*o*). Where a proposal or tender is accepted, subject to the terms of a contract being arranged and drawn up for signature, there is no concluded bargain until the terms have been arranged and a written contract executed (*p*). But an acceptance enclosing a more formal memorandum for signature is sufficient, if the memorandum contains no new terms (*q*). And where there is a reference made in a written acceptance of a building contract to the fact that a contract will afterwards be prepared, that may only be for the purpose of expressing the agreement already made in more formal language (*r*). It has been doubted whether the words "subject to the title being approved by our solicitor" would show that the contract is not complete (*s*). But it has been held that the words "this offer has been made subject to the conditions of the lease being modified to my solicitor's satisfaction" did not prevent the completion of the contract (*t*). A proposed contract is in general not binding on the party who proposes it, until the acceptance of the other party has been communicated to him or his agent (*u*). Thus, if a man applies for shares in a company, and the directors allot them to him, and, after the allotment, but before it is communicated to the applicant, he withdraws his application, there is no complete contract, and he is not bound to accept them (*x*). But although the applicant must have notice of the fact of the allotment, yet it is not necessary that a formal notice should be sent to him. It is enough if he is made aware that the company have accepted his application; but the mere entry of his name on the register of shareholders is not sufficient for this purpose (*y*). An offer of a

(*o*) *Routledge* v. *Grant*, 1 Moo. & P. 717; Bing. 653; *Cope* v. *Albinson*, 8 Exch. 185; *Felthouse* v. *Bindley*, 11 C. B. N. S. 869; 31 L. J. C. P. 204.

(*p*) *Kingston-upon-Hull* v. *Petch*, 10 Exch. 610; 24 L. J. Exch. 23; *Chinnock* v. *Ely*, 4 De G. J. & S. 638; *Honeyman* v. *Marryat*, 26 L. J. Ch. 619; *Appleby* v. *Johnson*, L. R. 9 C. P. 158; *Brogden* v. *Metropolitan Ry. Co.*, L. R. 3 Ap. Ca. 666; *Winn* v. *Bull*, 7 Ch. D. 29. And see *Heyworth* v. *Knight*, 17 C. B. N. S. 298; 33 L. J. C. P. 298.

(*q*) *Gibbons* v. *N. E. Metropolitan Asylum District*, 11 Beav. 1.

(*r*) *Lewis* v. *Brass*, 3 Q. B. D. 667; *Rossiter* v. *Miller*, 3 Ap. Ca. 1124.

(*s*) *Hussey* v. *Horne Payne*, 4 Ap. Ca. 311.

(*t*) *Bonnewell* v. *Jenkins*, 8 Ch. D. 70, C. A.

(*u*) *McIver* v. *Richardson*, 1 M. & S. 557; *Mosley* v. *Tinklen*, 1 C. M. & R. 692.

(*x*) *Hebbs' case*, L. R. 4 Eq. 9; 36 L. J. Ch. 748; *Graham, Ex parte*, 30 L. J. Bk. 42; Ch. 861; *Pellatt's case*, L. R. 2 Ch. 527; 36 L. J. Ch. 613.

(*y*) *Gunn's case*, L. R. 3 Ch. 40; 37 L. J. Ch. 40.

contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not in the ordinary course of the post arrive until after the offer has been accepted (z). A promise of marriage, so long as it remains unaccepted, amounts to a mere proposal or offer, which may be retracted at any time. Before, therefore, the plaintiff can succeed in an action upon such a promise, it must be shown that he or she accepted the proposal, and so entered into a corresponding engagement; and this acceptance may be proved and established by the conduct of the party, as well as by express words. And if an offer is made to another party and in that offer there is a request, express or implied, that he must signify his acceptance by doing some particular thing, then, as soon as he does that thing, he is bound (a). Where in a lease there is an option to purchase upon giving notice there is a binding contract as soon as notice is given (b). If an offer has been made by one man to sell goods to another, such offer is not, of course, binding until it has been accepted by the party to whom it has been made, as the one cannot be held liable to the other for not selling the goods, unless that other, by accepting the offer, has bound himself to purchase. Where the defendant proposed to sell goods to the plaintiff at a fixed price, and gave him, at his request, a certain time to determine whether he would buy them or not, and the plaintiff, within the time, determined to buy them, and gave notice thereof to the defendant, and offered to pay the price, but the latter then receded from his offer, and refused to deliver the goods and accept the money: it was held, in an action for the non-delivery of the goods, that there was no complete contract of sale; that, as the plaintiff was not by the original contract bound to purchase, there was no consideration to bind the defendant to sell; and that the engagement was all on one side, and was therefore a *nudum pactum* (c). This case, however, does not appear to be satisfactory, as the plaintiff seems to have accepted the offer before the withdrawal of it. A proposal once made is always open for acceptance until it is withdrawn to the knowledge of the other party, and such other party has the option of accepting the proposal until the moment when he receives notice of withdrawal (d). And, where there was a proposal by the defendant to take a lease from the plaintiff on certain terms, and to this proposal the plaintiff was to give a definite answer within six weeks, it was held that, if six weeks are given by one party to accept an

(z) *Byrne* v. *Van Tienhoven*, 5 C. P. D. 345.

(a) *Brogden* v. *Metropolitan Ry. Co.*, 2 Ap. Ca. 666; *per* Lord Blackburn, 691.

(b) *Mills* v. *Haywood*, 6 Ch. D. 196, C. A.

(c) *Cooke* v. *Oxley*, 3 T. R. 653.

(d) *Bryne* v. *Leon van Tienhoven*, 49 L. J. C. P. 316; *Stevenson* v. *McLean*, 5 Q. B. D. 346.

offer, the other has the same period to put an end to it. The contract must be mutual; and the one party cannot be bound without the other (*e*). If, however, anything has been given or done as the consideration for the promise—if, for instance, the party to whom it is made has agreed to incur any expense or labour in consideration of the offer being continued or kept open for a certain time—then the party making the offer is not at liberty to retract it. When the promise has been accepted, and the contract concluded, the acceptance cannot be revoked; and neither party is at liberty, without the consent of the other, to rescind the contract, or "be off" from his bargain (*f*). But, if the party to whom the offer is made does not accept it in the very terms in which it is made, and some new qualification or condition is annexed to the acceptance, the party making the offer is, of course, not bound by the acceptance (*g*). But an acceptance is not made conditional by an addition which is immaterial (*h*), nor by the existence of a misunderstanding between the parties as to the construction of collateral terms not part of the agreement itself (*i*). So if there is a conditional offer and an unconditional acceptance there is no contract (*k*). If a time is prescribed within which the proposal must be accepted, the offer comes to an end at the expiration of that time, and a subsequent acceptance is ineffectual. If no time is prescribed the acceptance must be made and notified within a reasonable time (*l*).

An offer to sell may be withdrawn before acceptance without any formal notice, as where the person who makes the offer sells the thing to a third person; even, as it should seem, although the person to whom the offer was made has no knowledge of the sale (*m*).

The contract dates from the acceptance, not from the date of the offer (*m*).

Where a person accepts an offer he must not adopt the proposed terms and yet slightly vary them without calling the attention of the party making the offer to the fact of the variation (*n*).

Biddings at an auction are mere offers, which may be retracted

(*e*) Best, C. J., *Routledge* v. *Grant*, 4 Bing. 653; 1 Moo. & P. 731.

(*f*) *Grant* v. *Hunt*, 1 C. B. 44.

(*g*) *Duke* v. *Andrews*, 2 Exch. 290; 17 L. J. Exch. 231; *Gilkes* v. *Leonino*, 4 C. B. N. S. 501; *Jordon* v. *Norton*, 4 M. & W. 161; *Addinell's case*, L. R. 1 Eq. 225; 35 L. J. Ch. 75; *Crossley* v. *Maycock*, L. R. 18 Eq. 180; *Stanley* v. *Dowdeswell*, L. R. 10 C. P. 102; *Jackson* v. *Turquand*, L. R. 4 H. L. 305; *Wynn's case*, L. R. 8 Ch. 1002; *Beck's case*, L. R. 9 Ch. 392.

(*h*) *Clive* v. *Beaumont*, 1 De G. & S. 397.

(*i*) *Baines* v. *Woodfall*, 6 C. B. N. S. 657, 676; 28 L. J. C. P. 338.

(*k*) *Shackleford's case*, L. R. 1 Ch. 567; *Roger's case*, L. R. 3 Ch. 633.

(*l*) *Ramsgate Victoria Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109; 4 H. & C. 164; 35 L. J. Ex. 90; *Bailey's case*, L. R. 5 Eq. 428; 3 Ch. 592.

(*m*) *Dickenson* v. *Dodds*, 2 Ch. D. 463.

(*n*) *Proprietors of English and Foreign Credit Co.* v. *Arduin*, L. R. 5 H. L. 64.

at any time before the hammer is down and the offer has been accepted. Where the defendant had retracted his bidding at an auction, the court said, "The assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done till the defendant had retracted. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on the one side, which is not binding on the other side till it is assented to" (*o*).

Acceptance of offers made by post.—Where the defendants wrote to the plaintiffs, making them an offer of merchandise at a fixed price, they "receiving an answer in course of post," it was held that there was a binding contract of sale the moment the letter accepting the offer was posted, and that the defendants were not at liberty to retract their offer before the arrival of the time for receiving the answer; otherwise, it was observed, no contract could ever be completed by post. In this case the defendants misdirected a letter, and so caused a delay in its receipt and in the return of the answer, and, not having received the answer at the expected time, they sold their merchandise to another person; and it was held that, as the delay had been occasioned by their own neglect, and not by any omission or default on the part of the plaintiff, the answer must be taken to have come back in due course of post, and that the defendants were liable upon the contract for the damage sustained by the plaintiff by reason of his loss of the bargain and of the non-delivery of the goods (*p*). If the letter in acceptance of the offer miscarries, and never reaches its destination, the contract is nevertheless complete (*q*), unless the miscarriage is owing to the fault of the sender. But a man is not bound by communicating his acceptance to his own agent only; in order that the contract may be complete and the acceptance

(*o*) *Payne* v. *Cave*, 3 T. R. 148; *Warlow* v. *Harrison*, 1 E. & E. 395; 28 L. J. Q. B. 18.

(*p*) *Adams* v. *Lindsell*, 1 B. & Ald. 681; *Potter* v. *Saunders*, 6 Hare, 1; *Newcombe* v. *De Roos*, 2 E. & E. 270; 29 L. J. Q. B. 4; *Taylor* v. *Merchants Fire Insurance Co.*, 9 How, S. C. 390.

(*q*) *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Duncan* v. *Topham*, 8 C. B. 225. Some doubt has lately been thrown on this point in *British American Telegraph Co.* v. *Colson*, L. R. 6 Ex. 108; 40 L. J. Ex. 97. See also *Reidpath's case*, L. R. 11 Eq. 86; and *Townsend's case*, L. R. 13 Eq. 148; *British American Telegraph Co.* v. *Colson* has, however, been disapproved of in *Harris's case*, L. R. 7 Ch. 587; 41 L. J. Ch. 621; and *Walls' case*, L. R. 15 Eq. 18; and has been overruled in *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216, C. A. Perhaps the true rule is that, if the person making the offer has expressly or impliedly authorised the receiver of the offer to send an answer by post, the person making the offer is bound when the letter containing acceptance is posted, on the ground that he has constituted the post office his agent to receive the acceptance; but that, when no such authority is expressed or can be implied, the person making the offer is only bound when the acceptance actually reaches him. See *per* Thesiger, L. J., p. 218, *ib.*, and *per* Lord Blackburn, in *Bregden* v. *Metropolitan Ry. Co.*, 2 Ap. Ca. 691.

irrevocable, there must be a communication of the acceptance to the proposer or his agent (*r*).

Contracts made by telegram.—Where an order is sent by telegram, the post-office authorities are only agents to transmit the message in the terms in which it is delivered to them, and if the telegraph clerk makes a mistake in the transmission there is no binding contract (*s*).

Contracts by deed are contracts in writing sealed and delivered by the parties to them. No cause, motive, or consideration beyond the mere will of the party making the contract, is necessary to give them validity; and no one can be permitted (except on the ground of fraud or deceit) to aver or to prove anything in contradiction to what he has solemnly and deliberately avowed by deed (*t*). The Courts, however, will not enforce specific performance of a voluntary covenant (*u*); and, for the purpose of ascertaining whether a covenant is voluntary or otherwise, it may be shown that there was in fact no consideration although one is expressed on the face of the deed (*x*), or that there was a good consideration, although the deed only expresses a nominal one (*y*), or none at all (*z*).

Authentication by deed.—The use of seals for the authentication of contracts and writings appears to have been almost unknown in England prior to the Conquest. Under the Anglo-Saxon government, contracts and written declarations and memorials were solemnly ratified with the sign of the cross in the presence of numerous witnesses, and derived all their force and efficacy from their ublicity (*a*). The custom of using a seal has prevailed in the far East from the most remote antiquity down to the present time (*b*). The practice was brought into general use in England by the Normans after the Conquest, who caused the ancient Saxon contracts and writings to be sealed with waxen seals in the presence of witnesses, and gave them the names of charters or DEEDS (*c*).

(*r*) *Ante*, p. 16.

(*s*) *Henkel* v. *Pape*, L. R. 6 Ex. 7; 40 L. J. Ex. 15.

(*t*) *Sharington* v. *Strotton*, Plowd. 1, 308 a, 309; *Morley* v. *Boothby*, 3 Bing. 111; 10 Moore, 404; *Fallowes* v. *Taylor*, 7 T. R. 477; *Shubrick* v. *Salmond*, 3 Burr. 1639; 1 Fonbl. Eq. 344, n. a.; 2 Finch, 108, 110.

(*u*) *Kekewick* v. *Manning*, 1 De G. M. & G. 176, 188.

(*x*) *Wilson* v. *Keating*, 28 L. J. Ch. 898.

(*y*) *Leifchild's case*, L. R. 1 Eq. 231.

(*z*) *Llanelly Railway and Dock Co.* v. *London and North-Western Ry. Co.*, L. R. 8 Ch. 942.

(*a*) *Mador.* Dissert. xxvi. form. Angl. p. 115, 131, 136, 176; *Spelman's* Gloss. p. 228; Monast. Angl. vol. 5, p. 269, col. 1.

(*b*) Esther, c. 8; Jeremiah, c. 32; 1 Kings, c. 21. See also Daniel, c. 6; *Lane's* Arabian Nights, note 11, p. 26. See the Arabian Nights, *passim*, as to the use of seals, and the story of the amorous lady and the 98 "seal-rings" of her different lovers.

(*c*) *Ingulph.* p. 901; *Selden*, Eadmeri Hist., p. 166, ed. 1623. As to the use of seals, see *Dugd.* Antiq. Warwickshire, p. 972; *Dufresne*, Gloss. tom. 3, p. 854; *Stabilimenta S. Ludov. Reg. Fran.* lib. 1, cc. 70, 71. *Monast. Angl.* tom. 1, p.

Requisites of deeds.—"Every deed ought to have writing, sealing, and delivery; and, if the parties be illiterate, it ought to be read also." It may be printed, or written on parchment or paper; and it is good and valid, although it mention no time, or date, or place of making, or be dated at one time and delivered at another, or have a false or impossible date. It is essential only that it be sealed and delivered; for "any agreement in writing sealed and delivered becometh a deed" (*d*). By the common law, a deed may be written in any hand or in any language; but the legislature has required all "certificates, patents, charters, bonds, records, judgments, statutes, and recognizances," to be written in the *English* language (*e*). Signing is not essential to the validity of a deed at common law (*f*); and the statute of frauds, which requires certain contracts to be authenticated by a signed writing, does not extend to deeds (*g*). It now rarely happens that the party executing a deed actually seals it with his own hands, or with his own seal. The seal is fixed or compressed on the deed by the person professionally employed, the executing party merely acknowledging, in the presence of witnesses, the seal to be his seal. It has been held also that one and the same seal may be the seal of half-a-dozen persons at the same time; for, "if one of the officers of the forest put one seal to the rolls by assent of all the verderers and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all" (*h*). But they must all be actually present consenting to the act; otherwise the execution is not good (*i*). The sealing, or the acknowledgment of the seal, must be made after the deed has been written, and before its delivery; for, if a blank piece of paper or parchment be sealed and delivered, and afterwards written upon, it is no deed (*k*); and, if indorsements or schedules are written or annexed to deeds after their execution, the deed must be re-sealed and re-delivered, or the subsequent addition to the contract will be nugatory and invalid (*l*). A bail bond which has been executed before the condition was filled up has been held to be void (*m*);

810; *Selden's Titles of Honour*, part 2, c. 5, pp. 651, 652; *Dufresne*, tom. 3, p. 854. One of the most ancient sealed documents of any authenticity in England is the Charter of Edward the Confessor to Westminster Abbey. Co. Litt. 7 a, speaks of a *sealed* charter as early as A.D. 956. Vin. Abr. *Faits*, 20.

(*d*) 11 Co. 27 b, 28 a.; Co. Litt. 171 b.; Shep. Touch. 1 ch. 4.

(*e*) 4 Geo. 2, c. 26.

(*f*) 1 Sugd. Powers, 297; Prest. Shep. Touch. 56 b.; *Cooch* v. *Goodman*, 2 Q. B. 597; *Tupper* v. *Foulkes*, 9 C. B. N. S. 797, 803; 30 L. J. C. P. 214.

(*g*) *Cherry* v. *Heming*, 4 Exch. 637; 19 L. J. Ex. 63.

(*h*) *Ball* v. *Dunsterville*, 4 T. R. 313 *R.* v. *Longnor*, 4 B. & Ad. 647.

(*i*) *Harrison* v. *Sykes*, 7 T. R. 207.

(*k*) *Perkins*, s. 118; Com. Dig. Fait. A. 1.

(*l*) *Weeks* v. *Maillardet*, 14 East, 570; *Sellin* v. *Price*, L. R. 2 Exch. 189.

(*m*) *Powell* v. *Duff*, 3 Camp. 181.

and so has a deed of conveyance or transfer of shares, executed by the proprietor of such shares with the name of the purchaser in blank, and handed over by him to the plaintiff, by whom, on the sale of such shares to the defendant, the defendant's name was inserted as the purchaser (*n*). And, if a deed be delivered, and a blank left therein be afterwards improperly filled up (at least, if that be done without the grantor's negligence), it is not the deed of the grantor (*o*).

Delivery of deeds.—Until the sealed writing is delivered, it is not a deed. The delivery "may be made by the party himself that doth make the deed, or by any other, by his appointment or authority precedent, or assent or agreement subsequent" (*p*); and it has been held that circumstances alone may be equivalent to a delivery, where no actual delivery can be proved (*q*). Where the party to a deed was shown to have acted under the instrument, and to have done a variety of things confirmatory of the contract, Lord Mansfield held that the acts so done amounted to an acknowledgment of the delivery of the deed (*r*). If the attesting witness is called and proves that he saw the defendant sign and seal the deed, and the plaintiff has possession of and produces the instrument, this is *primâ facie* evidence of a delivery to the plaintiff (*s*); and, if a party sends forth a deed to the world as his deed, he will be estopped, as against a party who has acted on the faith of the representation, from showing that the deed is not his deed, and that he never executed it. The mere placing of a seal to a written contract will not make the contract a deed. Thus, where an action of assumpsit had been brought upon certain articles of agreement, which, when produced, were not only signed by the parties, but had a seal opposite to each signature, but it appeared that the seals had been affixed to the document through ignorance and by mistake, it was held that the placing of a seal opposite to the name of the party, though evidence of a deed and one of the formalities belonging to it, was not to be taken as conclusive; and that, if the parties did not mean to contract by deed, and had made use of the seal in ignorance of its legal effect, the contract would have the force and effect only of a common agreement (*t*). A contract, bad

(*n*) *Hibblewhite* v. *M'Morine*, 6 M. & W. 200.

(*o*) *Swan* v. *North British Australasian Land Co.*, 2 H. & C. 175.

(*p*) Shep. Touch. 1 ch. 4, p. 57; *Tupper* v. *Foulkes*, 9 C. B. N. S. 797; 30 L. J. C. P. 214.

(*q*) *Doe* v. *Knight*, 5 B. & C. 689; *Thoroughgood's case*, 9 Rep. 136 a.; *Tupper* v. *Foulkes*, 9 C. B. N. S. 797; 30 L. J. C. P. 214; *Xenos* v. *Wickham*, L. R. 2 H. L. 296; 36 L. J. C. P. 313.

(*r*) *Goodright* v. *Straphan*, Cowp. 201; Co. Litt. 36; 2 Rolle Abr. 26; Vin. Abr. Faits (K.).

(*s*) *Hall* v. *Bainbridge*, 12 Q. B. 699.

(*t*) *Clement* v. *Gunhouse*, 5 Esp. 82, 83; *Goodright* v. *Gregory*, Lofft. 339; *Davidson* v. *Cooper*, 11 M. & W. 778; 13 M. & W. 343.

as a deed, may yet, under certain circumstances, be good as a common agreement (*u*).

Delivery as an escrow.—If a party signs and seals a deed, and places it on his drawer or his table, and another person comes and takes it away, this is not a delivery (*x*); and, if it should appear that the contract was delivered conditionally, and not with a view to its immediately taking effect as a deed, it is said to be delivered as an escrow, and an action cannot be maintained upon it until the condition has been performed (*y*). But it does not follow that, because a deed is to be executed in duplicate, its operation is suspended until both parts have been executed and interchanged (*z*).

Deeds inter partes *and deeds poll.*—When a deed is made between several persons, it is called a deed *inter partes*, and also an indenture. When it is made by one person alone, it is called a deed poll. The indenture or deed indented takes its name from the ancient practice of writing as many copies or parts of the deed as there were parties on one large sheet of parchment, in order that each party might have his part, and then cutting them off in a notched or wavy line, by which means they could at any time be compared together and identified. The deed poll was so called because the paper was polled or cut even, there being, as there was only one party to the deed, no necessity for a counterpart.

Contracts by matter of record are contracts acknowledged in open court before an officer of the court, and recorded in the presence of the party making the acknowledgment. A record thus made forms unimpeachable evidence of the contract, so that the contract is proved and established by the mere production of the record. Contracts by statutes merchant and statutes staple are contracts of record; and so also are the recognizances entered into by witnesses to enforce their attendance to give evidence at a trial.

Implied contracts.—With certain exceptions, referred to hereinafter, men are free to make such contracts as they may deem to be for their own interests, and the law will ascertain and carry into effect the intention of the parties. This intention is generally expressed either by word of mouth or in writing; and, in such cases, the contract is called an express contract. The intention of the parties to any particular transaction may, however, be gathered

(*u*) *R.* v. *Ridgwell*, 9 D. & R. 678; 6 B. & C. 665; *Hunter* v. *Parker*, 7 M. & W. 322.

(*x*) *Stanton* v. *Chamberlain*, Ow. 95; Cro. E. 122.

(*y*) Parke, B., *Bowker* v. *Burdekin*, 11 M. & W. 147; *Gudgen* v. *Bessett*, 6 Ell. & Bl. 986; 26 L. J. Q. B. 36; *Furness* v. *Meek*, 27 L. J. Exch. 34; *Millership* v. *Brookes*, 5 H. & N. 797; 29 L. J. Exch. 369; *Johnson* v. *Baker*, 4 B. & Ald. 440; *Murray* v. *Earl of Stair*, 2 B. & C. 82; Perk. sect. 137; *Watkins* v. *Nash*, L. R. 20 Eq. 262.

(*z*) *Kidner* v. *Keith*, 15 C. B. N. S. 35.

from their acts and deeds, in connexion with surrounding circumstances, as well as from their words; and the law therefore implies, from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials. If one man sends to the shop of another for food or clothing or articles of merchandise, or enters an inn and takes refreshment, the law implies a contract or promise from him to pay a reasonable sum for the articles and refreshments received, though nothing has been said or stipulated concerning price or payment. If one man is employed to work for another, the law raises an implied promise from the employer to pay the ordinary hire or reward for the work; and, if a man borrow a horse, the law implies a promise from the borrower to the lender to feed the animal properly and sufficiently whilst it remains in his charge and possession (*a*). It has been said that, "The only difference between an express and an implied contract not under seal is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances and the course of dealing between the parties. But whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence" (*b*).

Division of implied contracts.—Implied contracts have sometimes been divided into inferred contracts, implied contracts properly so called, and constructive contracts. A contract is said to be inferred where the intention of the parties is not expressed in words, but may be gathered from their acts and from surrounding circumstances. In these cases the law enforces what it deems to have been the intention of the parties.

It not unfrequently happens that in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and, consequently, where no intention has been expressed by them, or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities according to the dictates of justice—that is, of general expediency—and according to what it is presumed their intention would have been, had they had those circumstances in their consideration when they made the contract. In a third class of cases the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability,

(*a*) *Handford* v. *Palmer*, 5 Moore, 75.

(*b*) *Marzetti* v. *Williams*, 1 B. & Ad. 423; *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131.

similar to the rights and liabilities which exist in certain cases of express contract. Thus, if one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back; for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and, in fact, are not contracts at all.

SECTION II.

OF THE PARTIES TO CONTRACTS.

Parties entitled to enforce simple contracts.—The interest in and right of action upon simple contracts is not confined to the parties to the contract (*a*); but the person for whose use, or for whose benefit a simple contract has been entered into, may enforce it, although he is no party to it, and although the contract is not, in express terms, made with him, but with another on his behalf, provided the consideration moves from him. In the ordinary transactions of commerce, a man may sell or purchase in his own name, and yet it does not follow that the contract is exclusively his, but the transaction is open to explanation; and others who do not appear as parties to the contract are frequently disclosed, and step in to demand the benefit of it (*b*).

Except in the case of bills of exchange, promissory notes, and bills of lading, parties cannot annex to their contracts the incident of negotiability, and make them floating contracts payable to bearer. Where, therefore, the owner of a quantity of iron issued a note or undertaking in writing, whereby he promised to deliver on and after a future day 1000 tons of iron to the party who should lodge the note or undertaking with him, it was held that the instrument was invalid; for the law does not give a floating right of action to any one into whose hands such a writing may come (*c*). But, if a man publishes an advertisement promising to give a sum of money to any person who shall give certain information, there is a contract with the person who performs the condition (*d*). So, if a man signs and circulates a promise or

(*a*) *Carnegie* v. *Waugh*, 2 D. & R. 277; *Fitzmaurice* v. *Waugh*, 3 D. & R. 273; *Sutherland* v. *Pratt*, 13 L. J. Ex. 246.

(*b*) Per Lord Ellenborough, *Bickerton* v *Burrell*, 5 M. & S. 386.

(*c*) *Dixon* v. *Bovill*, 3 Macq. H. L. C. 16; *Williams* v. *Lake*, 2 Ell. & Ell. 349; 29 L. J. Q. B. 1.

(*d*) *Williams* v. *Carwardine*, 4 B. & Ad. 621.

agreement in writing to pay a certain specified sum of money to any person who shall do a particular act, and the writing is delivered to a party who does the act on the faith of the promise, such party is entitled to the money promised to be paid. Therefore, where the defendant, who was the master of a vessel, gave a written undertaking under his hand to pay 6*l.* to any person who should advance to a sailor that sum, provided the sailor should sail in the defendant's ship, then about to start, it was held that the plaintiff, who had advanced 6*l.*, partly in money and partly in goods, was entitled to recover that amount from the defendant (*e*).

Strangers to the contract.—If the act or service forming the cause or consideration for the promise to A. be done or performed by some third party, and not by A. himself, nor at his instance or by his procurement, A. is said to be a stranger to the consideration, and cannot enforce the contract (*f*); but, if the act or service has been rendered to B. at the instance and request, and through the instrumentality and procurement of A., the consideration moves from A. so as to enable him to enforce the promise (*g*). Where the defendant promised the father of the plaintiff that, if the plaintiff would marry the defendant's daughter, the defendant would pay to the plaintiff 20*l.*, and the marriage was celebrated, and the plaintiff claimed the 20*l.*, and it was objected that the promise was not made to him, but to his father, the court held that the action was properly brought by the plaintiff, who had performed the meritorious act forming the consideration for the promise (*h*). But where, after the marriage, the fathers of the husband and wife agreed together that each should pay a sum of money to the husband, and that the latter should have full power to sue for the money, it was held, nevertheless, that the husband, not being a party to the agreement, could not enforce it (*i*).

If there is a benefit to the defendant, and a loss to the plaintiff, directly resulting from the defendant's promise in favour of the plaintiff, there is a sufficient cause or consideration moving from the plaintiff to enable the latter to maintain an action upon the promise. Where Sir Edward Poole being about to cut down 1,000*l.* worth of timber on his estate, for the purpose of portioning

(*e*) *M'Kune* v. *Joynson*, 5 C. B. N. S. 218; 28 L. J. C. P. 133. But see *Williams* v. *Lake*, *supra*.

(*f*) *Price* v. *Easton*, 4 B. & Ad. 434; 1 N. & M. 303; *Crow* v. *Rogers*, 1 Str. 592; *Bourne* v. *Mason*, 1 Ventr. 6; 2 Keb. 457.

(*g*) *Curtis* v. *Collingwood*, 1 Ventr. 297; *Lampleigh* v. *Braithwaite*, 1 Smith's L. C. 135, 5th ed.; Hob. 105; *Townsend* v. *Hunt*, Cro. Car. 480: Denman, C. J., *Eastwood* v. *Kenyon*, 11 Ad. & E. 452; *Martyn* v. *Hind*, 1 Cowp. 437; 1 Doug. 142.

(*h*) *Prounder* v. *Wood*, Het. 30; *Aguacio* v. *Forbes*, 14 Moo. P. C. 171, *post*, p. 43; and see *Garrett* v. *Handley*, 3 B. & C. 462; 5 D. & R. 319; 4 B. & C. 664; 7 D. & R. 144; *Thatcher* v. *England*, 3 C. B. 262.

(*i*) *Tweddle* v. *Atkinson*, 1 B. & S. 393 30 L. J. Q. B 265.

his daughter Grisel, the eldest son and heir promised Sir Edward that, if he would not fell the timber, he, the son, would pay his sister Grisel 1000*l.*, and Sir Edward, confiding in his son's promise, allowed the timber to stand, and after his death the land, with the timber growing thereon, descended to the son, who then refused to fulfil his promise, whereupon the daughter and her husband brought an action against him, it was held that the action was well brought, for the son had the benefit of having the timber, and the daughter had lost her portion by reason of the brother's promise (*k*). So where Rookwood being about to charge his lands with 40*l.* per annum to each of his younger sons for their lives, the eldest son desired him not to charge the land, and promised to pay the younger sons duly the 40*l.*, and Rookwood, confiding in this promise, neglected to make the provision he had intended for his younger children out of the land, and after his death the eldest son refused to fulfil his promise, whereupon the two younger sons brought an action for the recovery of the money, the whole court held clearly that the action was well brought, and that it was a good consideration; for the defendant's land would have been charged with the rents but for his promise to pay the money to the plaintiffs (*l*). In these cases the consideration indirectly moves from the party in whose favour the promise is made.

It was formerly held that the near relationship of parent and child extended to the child an interest in a contract entered into by the parent in its behalf and for its benefit; that the parent might be considered as the mere agent of the child in whose behalf and for whose benefit the contract was made, and that the latter might consequently maintain an action upon it (*m*). Thus, where the defendant promised a physician that, if he succeeded in effecting a particular cure, he, the defendant, would give a certain sum of money to the physician's daughter, and the daughter brought the action, it was adjudged maintainable; "for the nearness of the relation gives the daughter the benefit of the consideration performed by the father" (*n*). But these cases could not now be supported at law (*o*), and in equity a third person cannot enforce a stipulation made by another in his favour, and for which that other has given valuable consideration, with the

(*k*) *Dutton* v. *Poole*, 2 Lev. 210; 1 Vent. 318, 334; T. Jones, 102; affirmed in error in the Exchequer Chamber, T. Raym. 392. "It is difficult to conceive," said Lord Mansfield, "how a doubt could be entertained in the case of *Dutton* v. *Poole*," *Martyn* v. *Hind*, *supra*.

(*l*) *Rookwood's case*, Cro. Eliz. 164; and see Story's Comm. on Eq. Jur. s. 64.

(*m*) *Dutton* v. *Poole*, 2 Lev. 211; Hardr. 321; *Thomas* v. ——, Styles, 461; *Bafeild* v. *Collard*, Aleyn, 1; *Rippon* v. *Norton*, Cro. Eliz. 849, 881.

(*n*) *Bourne* v. *Mason*, 1 Ventr. 6; *Levet* v. *Hawes*, Cro. Eliz. 619, 652; Het. 176; *Rainer* v. *Mortimer*, 1 Browul. 40.

(*o*) *Tweddle* v. *Atkinson*, *ante*, p. 25.

view of benefiting such third person, unless his condition in life has been altered by and in consequence of the stipulation (*p*). Where the uncle and guardian of an infant, at the request of the infant, delivered 12*l.* to J. S. to educate the infant, and, in consideration of this, J. S. promised to educate the infant, and to pay the infant 12*l.* when he came of age, it was held that the latter was the proper party to maintain an action for the non-payment of the 12*l.* (*q*). An action will not lie against a railway company, as carriers of passengers for hire, at the suit of a master, for a personal injury sustained through their negligence by his servant, whereby the master lost the benefit of the services of the servant; the contract out of which rose the duty to carry safely being a contract between the company and the servant (*r*). So, also, where a master sent forward his servant by train with his portmanteau, and it was delivered by the servant and accepted by the company as part of the servant's luggage, nothing being said as to the ownership of the portmanteau, it was held that no action lay against the company by the master for the loss of his portmanteau, on the ground that the contract was between the company and the servant (*s*). And, where a telegraph company negligently mis-sent a message containing an offer for a cargo of ice to the vendor, in consequence of which the vendor incurred expense, it was held that he could not sue the telegraph company, because their contract was with the sender of the message and not with the receiver, although, if the sale had been effected, the vendor would, by the course of the trade, have been bound to re-pay the sender the cost of the message (*t*).

Parties to contracts with bankers, warehousemen, and wharfingers.—If money is sent to a banker for the payment of certain debts, the consideration for a promise by the banker to pay over the money, pursuant to the directions he has received, is said to move from the creditor whose particular debt is to be paid, and who is the object of the remittance; it being considered that the debtor is the agent of the creditor, and that the money is paid indirectly to the banker by the latter (*u*). But in all cases where money is sent to one person to be paid by him to another, to enable the person who is the object of the remittance to maintain

(*p*) Spence's Equit. Jur., vol. 2, pp. 280—286.

(*q*) *Odham* v. *Bateman*, 1 Rolle Abr. 31, pl. 8.

(*r*) *Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213; 34 L. J. C. P. 292.

(*s*) *Becker* v. *The Great Eastern Ry. Co.*, L. R. 5 Q. B. 241. But it is difficult to understand why the plaintiff was not entitled to recover the value of the portmanteau on the ground that it was his property.

(*t*) *Playford* v. *United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706; 38 L. J. Q. B. 249.

(*u*) *Lilly* v. *Hays*, 5 Ad. & E. 548; *Moore* v. *Bushell*, 27 L. J. Ex. 3; *Noble* v. *Nat. Disct. Co.*, 5 H. & N. 228; 29 L. J. Ex. 210.

an action against the remittee to recover the amount transmitted to him, there must be an express promise or assent on the part of the latter to pay over the money to the former, or to hold it to his use, inasmuch as the mandate is revocable so long as no such assent, promise, or engagement, has been given or entered into (*x*). When, however, the assent has been given, and the attornment made, the order to pay the money, if founded upon a precedent debt or other good consideration, becomes irrevocable (*y*); the creditor looks no longer to the security of his original debtor, but relies on the assent of the remittee, which cannot be retracted, and is entitled to maintain an action against him for the amount received (*z*). But, if the amount transmitted be a mere voluntary gift or donation, founded upon no precedent consideration, debt, or duty, the authority may be revoked at any time before the money is actually paid over by the remittee (*a*), just as money, when paid by mistake to an agent, and placed by him to the account of his principal, but not paid over, may be recovered back by the party who has inadvertently transmitted it (*b*). Subject to these qualifications, some of the old cases in Rolle's Abridgment, where it has been held that, if 20*l.* be delivered to B. to pay over to C., C. can maintain an action against B. to recover this money, or that, when goods are given by A. to B., under an agreement that B. shall pay 20*l.* to C., that becomes a debt due to C., may still be considered good law (*c*). Warehousemen, wharfingers, and bailees of goods, stand in the same situation as bankers and depositaries of money; and, when they have accepted a delivery order, presented to them by a purchaser, they become the bailees of the party mentioned in such order, and are liable to him upon their promise to hold the goods on his account and at his disposal (*d*).

Parties entitled to enforce contracts under seal.—As a contract under seal requires no consideration to support it, the common law regarded only the instrument itself; and whenever a deed was expressed to be made between certain persons named in the premises of the instrument, or described therein as the contracting parties, those persons only and their privies claiming

(*x*) *Williams* v. *Everett*, 14 East, 597; *Fisher* v. *Miller*, 7 Moore, 537; *Baron* v. *Husband*, 4 B. & Ad. 611; *Howell* v. *Batt*, 5 B. & Ad. 504; 2 N. & M. 381; *Wedlake* v. *Hurley*, 1 C. & J. 83; *Grant* v. *Austen*, 3 Price, 58; *Brind* v. *Hampshire*, 1 M. & W. 373; *Hill* v. *Royds*, L. R. 8 Eq. 292.

(*y*) *Winter* v. *Fowcracres*, 2 Roll. Rep. 39, 40; *Robertson* v. *Fauntleroy*, 8 Moore, 10; *Atkin* v. *Barwick*, 1 Str. 165; *Hodgson* v. *Anderson* 3 B. & C. 842; 5 D. & R. 744; *Walker* v. *Rostron*, 9 M. & W. 411; *Griffin* v. *Weatherby*, L. R. 3 Q. B. 753.

(*z*) Best, C. J., *Gibson* v. *Minet*, 9 Moore, 36.

(*a*) *Lyte* v. *Peny*, Dyer, 49 a, b, p. 7; *Taylor* v. *Lendey*, 9 East, 54.

(*b*) *Buller* v. *Harrison*, 2 Cowp. 565.

(*c*) *Starkey* v. *Mylne*, 1 R. Abr. p. 32, pl. 13; *Disborne* v. *Denabie*, *ib.*, pp. 30, 31, Z. pl. 5.

(*d*) *Bryans* v. *Nix*, 4 M. & W. 791.

through them by blood, representation, or otherwise, could take advantage of it by way of action (e). It mattered not that the deed was made for the exclusive benefit or use of other individuals named therein, and contained covenants with them for the performance of certain duties, if they had not been made parties to the contract they could not sue thereon, although they might have sealed and delivered the deed in common with those who were formally described as the parties to the instrument (f). And although the 8 & 9 Vict. c. 106, s. 5, enacted that, after the 1st of October, 1845, an immediate estate or interest, and the benefit of a condition or covenant respecting any tenements or hereditaments, might be taken, although the taker thereof was not named a party to the same indenture (g), this enactment was held only to apply to covenants respecting any tenements or hereditaments; and, therefore, where a composition deed was expressed to be made between "the several persons whose names and seals are subscribed and affixed in the schedule hereunder written, being creditors executing these presents as parties of the first part" and other parties, it was held that creditors who did not execute the deed were not parties to it, and could not take advantage of the covenants contained therein, although they were expressed to be made with the parties of the first part and all other creditors (h). But, where a similar deed was expressed to be made with all the creditors, it was held that all were parties, and could sue on the covenants, which were expressed to be made with each creditor severally (i). When a deed was not made reciprocal between parties of the one part and parties of the other part, but was expressed to be made generally "to all" in the nature of a deed poll, then, if any one or more persons contracted or covenanted therein with a stranger, the latter might bring an action upon the deed against the parties so covenanting and contracting, provided they had duly sealed and executed the instrument, as in the case of an ordinary bond or obligation, where "fifty persons may be bound to one who is no party to the instrument, and all are liable to an action at his suit" (k).

When there was no formal commencement to a deed describing who were the parties to it, and whose deed it was, it was held to

(e) *Chesterfield and Midland Silkstone Colliery Co.* v. *Hawkins*, 3 H. & C. 677; 34 L. J. Ex. 121.

(f) *Gilby* v. *Copley*, 3 Lev. 138; *Berkeley* v. *Hardy*, 8 D. & R. 102; 5 B. & C. 355; *Lord Southampton* v. *Brown*, 6 B. & C. 718; *Metcalfe* v. *Rycroft*, 6 M. & S. 75.

(g) And see the 7 & 8 Vict. c. 76, s. 11, repealed by 8 & 9 Vict. c. 106, s. 1.

(h) *Chesterfield and Midland Silkstone Colliery Co.* v. *Hawkins*, 3 H. & C. 677; 34 L. J. Ex. 121; *Gurrin* v. *Kopera*, 3 H. & C. 694; 34 L. J. Ex. 128.

(i) *Gresty* v. *Gibson*, 4 H. & C. 28; L. R. 1 Ex. 112; 35 L. J. Ex. 74; *Reeves* v. *Watts*, L. R. 1 Q. B. 412; 35 L. J. Q. B. 171; *McLaren* v. *Baxter*, L. R. 2 C. P. 559.

(k) *Cooker* v. *Child*, 2 Lev. 74.

be the deed of those who were named in the instrument as the contracting parties, and who put their seals to it (*l*). But they must have been named or designated in the body of the deed; for no person could maintain an action upon a contract under seal unless he was named therein, either by his own name or by some acquired or adopted name, or was otherwise described therein (*m*); and the contract or covenant must in express terms have been made with him (*n*).

Trustee and cestui que trust.—It was a fixed rule of law that the action upon a contract under seal, whether such contract was a deed *inter partes* or a deed poll, must be brought by the party with whom the contract was in terms made, and not by the person on whose behalf, or for whose benefit it had been made (*o*). In those cases the party to whose use or for whose benefit the contract had been entered into had a remedy in equity against the person with whom it was expressed to be made. The Court of Chancery deemed the latter a trustee for the former, and would compel him to execute his trust according to the apparent intention of the contracting parties. Hence, the one was technically said to have the legal and the other the equitable interest in the contract. When, however, no express promise or engagement was entered into with some person or persons in particular, the case was different. If, for example, a man by writing, sealed and delivered, acknowledged generally that he had received a particular sum of money to the use of A., this made him a debtor to A. to the amount specified (*p*). A bill or receipt under seal was couched in the following terms: "Received of A. 40*l.*, to the use of B. & C., equally to be divided between them, to be repaid at such time as shall be most to the profit of B. & C.;" and it was held that this was an engagement with B. & C. to pay the money to them whenever they required it, and that B. & C. might consequently maintain an action for the recovery of the 40*l.* (*q*).

These distinctions have, however, become of less consequence since the passing of the Supreme Court of Judicature Act, 1873, by the operation of which the beneficial interests arising under deeds will be recognised in every Court as amply as they were formerly in the Courts of Equity.

Covenantees who have omitted to execute the deed.—It is not in general necessary that those who have been made parties to a deed

(*l*) *Nurse* v. *Framton*, 1 Ld. Raym. 28.

(*m*) *Maughan* v. *Sharpe*, 17 C. B. N. S. 443; 34 L. J. C. P. 19.

(*n*) *Sund. Marine Ins. Co.* v. *Kearney*, 16 Q. B. 935; 20 L. J. Q. B. 421.

(*o*) *Offly* v. *Warde*, 1 Lev. 235; *Barford* v. *Stuckey*, 5 Moore, 23; 2 B. & B. 333.

(*p*) *Core* v. *Woddye*, Dyer, 23, a.

(*q*) *Shaw* v. *Sherewood*, Cro. Eliz. 729; *Sund. Marine Ins. Co.* v. *Kearney*, *supra*.

inter partes should execute the deed to be enabled to sue thereon (*r*). Neither need a grantee under a deed execute, provided he has been made a party to the deed; for the law presumes his assent to the grant in the absence of an express disclaimer (*s*). Where real property, therefore, is conveyed to trustees, parties to a deed, it is not necessary for them to execute, as the legal estate forthwith vests in them unless they disclaim the grant; and, if one of the trustees renounces, the whole property vests in those who accept the trust (*t*). When, however, the execution of the deed by one of the parties is necessary to create or transfer some estate or interest, the creation or transfer of which forms the foundation or consideration for the covenants and stipulations contained in the deed, the party neglecting to execute cannot then maintain an action upon the covenants (*u*). Where tenant for life and remainder-man are parties to an indenture, whereby they (so far as they legally can and may, according only to their respective estates and interest) demise their estate for a term of years, and the lessee enters into possession, the tenant for life may sue him for breach of covenant, although the indenture has not been executed by the remainder-man (*x*).

Parties liable upon simple contracts.—A person who signs a promissory note or an undertaking on behalf of another (*y*), or who is made a party to an agreement *inter partes*, and signs it in his own name in behalf of another, will himself be personally responsible for the fulfilment of the contract, unless it clearly appears that he executed it as agent only, and that it was not intended that he should be personally liable upon it (*z*). Where the plaintiff agreed with two persons "to pave their streets in Putney," and they, "on behalf of the parish, agreed to pay him" therefor, it was held that, as the parish could not be sued upon such an undertaking, the work must have been taken to have been done upon the personal security and credit of the promisors, and that they were therefore personally liable upon their agreement (*a*). So, where the respective attorneys for the prosecutor and defendants, on an indictment against the same parish for not re-paving a road, entered into an agreement, by which the attorney for the prosecutor agreed that the recognizances should be respited, and the

(*r*) *Rose* v. *Poulton*, 2 B. & Ad. 830.

(*s*) *Townson* v. *Tickell*, 3 B. & Ald. 31. The disclaimer of a grant of realty should be made by deed. Fitz. Ab. Joint-Tenancy, pl. 9.

(*t*) *Small* v. *Marwood*, 9 B. & C. 300.

(*u*) *Antram* v. *Chace*, 15 East, 212; *Dover, in re*, 18 Jur. 52; *Morgan* v. *Pike*, 14 C. B. 473.

(*x*) *How* v. *Greek*, 3 H. & C. 391; 34 L. J. Ex. 4.

(*y*) *Ireson* v. *Conington*, 2 D. & R. 309; *In re Gee*, 10 Jur. 694; *Burrell* v. *Jones*, 3 B. & Ald. 47–51.

(*z*) *Cooke* v. *Wilson*, 1 C. B. N. S. 164; *Lennard* v. *Robinson*, 5 Ell. & Bl. 942; 27 L. J. Q. B. 49; *Deslandes* v. *Gregory*, 29 L. J. Q. B. 95; 30 *ib.* 36.

(*a*) *Meriel* v. *Wymondsold*, Hardr. 205.

attorney for the defendants agreed, "on the part of the parish," to pay the costs, it was held that the agreement was personally binding upon the attorney for the defendants (*b*). An undertaking by one man on behalf of another may either be the undertaking of an agent, or of a principal and sole contracting party who comes forward to secure, on his own credit and responsibility, some benefit and advantage for a friend (*c*); or it may be the undertaking and guarantee of a surety, who binds himself for the performance of some act or duty by a third party who is to be primarily liable upon the contract.

One person may, as we have already seen, have the benefit of the performance of the consideration for a simple contract or promise, and another may be liable upon it as the really contracting party: "If A. contracts with B. to make a coat for C., A. must pay for it, though C. wears it." But, if the plaintiff has made the party to whom the goods have been furnished his debtor, if, for instance, he describes him as such in his books or in letters, he can only treat the other as a surety (*d*). Where the defendant gave a written undertaking to pay the directors of the Manchester Gas Works for "all the gas which may be consumed in the theatre during the time that it is occupied by my brother-in-law, Mr. Neville," it was held that he might be made liable as the primary and sole debtor in an action for goods sold and delivered (*e*).

Where the managers of a particular undertaking, having a public, or corporate, or partnership fund at their disposal, or power to impose assessments or make calls, and create a fund to defray expenses, employ workmen and servants, they will be personally responsible for the payment of the parties they employ, if credit has been given to them and not to the fund at their disposal. But, "whether any contract is made, or on what terms it is made, must depend upon the circumstances of each case. If a party merely speculates on the chance of being paid, taking the risk whether funds will be collected and appropriated to his demand or not, there is no contract" (*f*). If he is to be paid, provided the requisite funds are obtained and not otherwise, there is a conditional contract, which becomes absolute as soon as funds have been received (*g*).

(*b*) *Watson* v. *Murrell*, 1 C. & P. 307.

(*c*) *Redhead* v. *Cator*, 1 Stark. 14; *Hall* v. *Ashurst*, 1 Cr. & M. 714; *Downman* v. *Jones*, 14 L. J. Q. B. 228; *Harper* v. *Williams*, 4 Q. B. 235; *Johnson* v. *Ogilby*, 3 P. Wms. 277.

(*d*) *Austen* v. *Baker*, 12 Mod. 250; *Anderson* v. *Hayman*, 1 H. Bl. 121; *Langdale* v. *Parry*, 2 D. & R. 37, 340.

(*e*) *Wood* v. *Benson*, C. & J. 94; 2 Tyrw. 93; *Edge* v. *Frost*, 4 D. & R. 245.

(*f*) *Landman* v. *Entwistle*, 7 Exch. 632; *Giles* v. *Smith*, 11 Jur. 334; *Alexander* v. *Worman*, 6 H. & N. 100; *Andrews* v. *Dally*, 4 Bing. 566.

(*g*) *Higgins* v. *Hopkins*, 3 Exch. 163; 18 L. J. Ex. 113.

Parties liable upon deeds.—A person not made a party to a deed may render himself liable to be sued thereon by sealing and delivering the deed; for one who is no party to a deed may covenant with another who is a party, and thereby be bound; he may oblige himself by the deed, if there be express words to it, and the deed be sealed by him (*h*). A man may also be bound by the covenants of a deed in which he is described as a party, though he does not execute it, if he assents to it, and takes a benefit under it, and treats the contract as his deed (*i*). If a party sends forth a deed to the world as his deed, he cannot be heard to say that the instrument so sent forth as his own, professed to be signed by his own name, and to be sealed with his seal, is not his deed. If he intended to have the benefit of the representation, he cannot reject the burthen; he cannot be heard to say, against those who have dealt with him on the strength of the deed being his deed, that it is not his deed, that it was never executed by him, or that it was executed without his sanction or authority (*k*). If, too, he sends forth a deed as a valid deed, and induces others to act upon the representation, he is estopped from afterwards setting up the invalidity of the instrument, and showing that it was a simple nullity (*l*). Where property is assigned by deed to a trustee, who covenants with the assignor, the assignor has no equity to proceed against the *cestui que trust* (*m*).

Covenants in feigned names—Estoppel.—Generally speaking, the name of the covenantor or obligor appears in the body of the deed; but there is a sufficient designation and description of the party to be charged if the name is written at the foot of the instrument (*n*). A man may bind himself by deed either in his own name, or by some acquired or adopted name, title, or description. Where, therefore, the defendant described himself in a deed by the name of "Davis and Marsh," he was held estopped from showing that his name was Davis only (*o*). So, if a man executes a bond in the name of Thomas, he is estopped by the bond from pleading that his name is Joseph. If he is described as James in the body of the deed, and executes it in the name of John, by writing that name against the seal, and is sued in the name of John, and pleads the misnomer, the plaintiff may rely on the estoppel, and the deed is conclusive evidence of the adoption by the defendant of the names both of James and John (*p*). If the defendant has not

(*h*) Holt, C. J., *Salter* v. *Kidgley*, Holt, 210; Carth. 76.
(*i*) *Webb* v. *Spicer*, 13 Q. B. 893; 18 L. J. Q. B. 142.
(*k*) *Ex parte Straffon*, 16 Jur. 440.
(*l*) *Sheff., Asht., &c., Ry. Co.* v. *Woodcock*, 2 Rail. Cas. 522.
(*m*) *Pickering's Claim*, L. R. 6 Ch. 525.
(*n*) *Nurse* v. *Frampton*, 1 Ld. Raym. 28; 1 Salk. 214; 4 Ed. 2, cited Cro. Eliz. 57.
(*o*) *Elliott* v. *Davis*, 2 B. & P. 339.
(*p*) *Gould* v. *Barnes*, 3 Taunt. 505;

sealed and delivered the deed with his own hand, it must be made out that he is a party to it in point of law, by showing that the party who sealed and delivered the deed in his name was authorised so to do by a power of attorney or written authority under seal.

Covenants and obligations by one person on behalf of another.—If an individual in a private capacity, not acting on behalf of the government, covenants in his own name for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting "for and on the part and behalf" of such other person. But, when upon the face of the contract it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfilment of the contract, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done (q).

Joint and several agreements and promises.—Where a defendant, a surveyor of highways, had incurred legal expenses on behalf of a parish, which were objected to, and opposition threatened to his accounts before the vestry, and the defendant at the meeting of the vestry offered to pay 50*l.* of those expenses if the opposition was withdrawn, and the plaintiff and the other vestrymen present accepted the offer and signed a minute to that effect, and withdrew the opposition, and suffered the accounts to be passed, and the plaintiff who was appointed successor to the defendant in the office of surveyor, sued the defendant for the 50*l.*, it was held that he had no claim to the money, as the contract was with all the vestrymen present at the meeting, and not with the plaintiff alone (r).

If there be a joint retainer and employment of another by divers persons to do one thing for the benefit of all, they have a joint legal interest in the fulfilment of the contract by the party employed, although they may have several beneficial interests, and be possessed of separate shares, in the subject-matter of the contract; but, if there be a separate retainer by each, in respect of the separate share of each, then they have separate interests in the fulfilment of the contract (s).

If, in consideration of certain services to be rendered by the

Lind v. *Hook*, Mod. Cas. 225, cited Cro. Eliz. 897 n. (a); *Janes* v. *Whitbread*, 11 C. B. 406; *Reeves* v. *Slater*, 7 B. & C. 489; *Williams* v. *Bryant*, 5 M. & W. 454.

(q) *Wake* v. *Harrop*, 30 L. J. Ex. 273; 6 H. & N. 768; 1 H. & C. 202; *Unwin* v. *Wolseley*, 1 T. R. 674; *Allen* v. *Waldegrave*, 2 Moore, 128.

(r) *Kilham* v. *Collier*, 21 L. J. Q. B. 65; *Lucas* v. *Beale*, 20 *ib.* C. P. 134.

(s) *Hatsall* v. *Griffith*, 2 Cr. & M. 679; *Hill* v. *Tucker*, 1 Taunt. 7; *Ivans* v. *Draper*, 1 Roll. Abr. 31, pl. 9.

promisees, a promise is made to pay them a sum of money, this is a joint promise in favour of all, in which all are jointly interested; and the pointing out the particular share that each is to receive of the sum so promised to be paid will not create a severance of interest. But, if one sum *in solido* is not to be paid in the first instance, and afterwards divided, but separate and independent payments are to be made to each, then their interests are separate (*t*).

Of joint and separate interests in deeds.—If parties take a joint estate under a deed, and a covenant affecting the enjoyment of that estate is entered into with them and "each of them," the covenant is a joint covenant. If, on the other hand, the covenantees have separate estates and interests, then a separate duty arises to each one in respect of their several estates (*u*).

If a covenant to do a particular act be entered into with several persons generally, as "with A., B., and C.," they have all *primâ facie* a joint interest in the performance of it (*x*). If a covenant is entered into with divers persons to keep a certain sea-wall in repair, this is, *primâ facie*, a joint covenant; but, if it appears on the face of the deed that the covenantees are so many separate landowners, possessed of separate estates, the covenant shall be construed to be a several covenant, by reason of their several interests.

If any one of several partners or joint adventurers enters into a contract or stipulation with the rest, such as an engagement not to trade on his own account, or not to sell merchandise without the assent of the others, &c., this is a joint contract; for they have a joint interest in the performance of it, and the breach operates as a joint damage to all. A covenant with several persons for the payment to them of a sum of money is a joint covenant with all, in the performance of which they have a joint interest; and the pointing out of the share which each is to take of the entire amount will not create a separation of interests (*y*); but, if a covenant be made with ten persons to pay a distinct sum of money to each of them, a separate duty arises to each; and it is the same in contemplation of law as if a separate and distinct contract had been entered into with each one of the parties separately (*z*).

(*t*) *Thomas* v. ——, Styles, 461.

(*u*) *Slingsby's case*, 5 Co. 18 b.; *Windham's case*, *ib.* 7 b.; *James* v. *Emery*, 8 Taunt. 245; 2 Moore, 195; *Foley* v. *Addenbrooke*, 4 Q. B. 207; *Hopkinson* v. *Lee*, 6 *ib.* 964; *Wakefield* v. *Brown*, 9 *ib.* 209; *Pugh* v. *Stringfield*, 27 L. J. C. P. 34; *Haddon* v. *Ayers*, 28 L. J. Q. B. 105.

(*x*) *Sorsbie* v. *Park*, 12 M. & W. 156-158; *Bradburne* v. *Botfield*, 14 *ib.* 573; *Keightley* v. *Watson*, 3 Exch. 725; *Wetherell* v. *Langston*, 17 L. J. Ex. 341; 1 Exch. 634; *Servante* v. *James*, 10 B. & C. 410; 5 M. & R. 299.

(*y*) *Lane* v. *Drinkwater*, 1 C. M. & R. 599; *Byrne* v. *Fitzhugh*, *ib.* 613, *n.* (a); *English* v. *Blundell*, 8 C. & P. 332.

(*z*) *Withers* v. *Bircham*, 3 B. & C. 254; *Shaw* v. *Sherwood*, Cro. Eliz. 729.

Rights of tenants in common.—If two tenants in common make a lease, reserving one entire rent to themselves, they have a joint interest in the rent, although it is reserved to them "according to their several and respective rights and interests;" but, if there are several demises, and a separate reservation of rent to each tenant in common, they have separate interests (*a*). When an estate in land, with covenants annexed, comes to two persons as tenants in common, their interests are in certain cases joint or several at their election (*b*). If, after a joint demise by tenants in common with a general reservation of one entire rent, one tenant in common dies, the rent is severable, and follows the separate reversions, so that the heir at law of the deceased tenant in common is entitled to one moiety of the rent, and may maintain an action against the surviving tenant in common, for receiving more than his share (*c*). A covenant to repair in a joint demise by tenants in common runs with the entire reversion; and all the tenants in common of the reversion at the time of the breach, or their representatives, are jointly interested in it (*d*).

Rights of joint tenants.—If two joint tenants make a lease of their land, reserving rent to one of them, it shall enure to both in respect of the joint reversion (*e*); and the same rule holds good with respect to parceners who have a unity of interest, title, and possession, and together constitute but one heir (*f*).

Joint and separate interests in the case of implied contracts and promises.—In implied contracts and promises, if the consideration moves from several persons jointly, the law raises a corresponding implied promise in favour of all, in which all are jointly interested; but if there be several separate considerations moving from the parties separately and individually, the law implies a separate promise in favour of each, and their interests are separate (*g*). A carrier, being in want of assistance upon the road, engaged two persons separately to aid him with their horses. Each sent three horses, with a carter to attend them, and the six drew the waggon; and they were directed to send in their *several* accounts. The two brought a joint action for the hire; but it was held not to be maintainable, as they had no joint interest (*h*). If several persons agree to make a joint purchase, and employ an agent to buy merchandise on their joint account, and the agent goes into the market and makes the purchase in his own name, and the

(*a*) *Powis* v. *Smith*, 5 B. & Ald. 850; *Last* v. *Dinn*, 28 L. J. Ex. 94; *Wilkinson* v. *Hall*, 1 Scott, 675.

(*b*) *Midgeley* v. *Lovelace*, Carth. 289; *Kitchen* v. *Buckly*, 1 Lev. 109; *Womersley* v. *Dally*, 26 L. J. Ex. 219.

(*c*) *Beer* v. *Beer*, 12 C. B. 60.

(*d*) *Thompson* v. *Hakewill*, 19 C. B. N. S. 713; 35 L. J. C. P. 18.

(*e*) Co. Litt. 214 a, 180 b.

(*f*) *Decharms* v. *Horwood*, 4 M. & Sc. 400.

(*g*) *Coleman* v. *Sherwin*, 1 Salk. 137; *Story* v. *Richardson*, 6 Bing. N. C. 129.

(*h*) *Smith* v. *Hunt*, 2 Chit. 142.

vendor neglects to fulfil the contract, the employers of the agent are jointly interested in the contract made by their agent (*i*); and, if goods and chattels are deposited by several joint owners in the hands of a bailee, they are not claimable by one of them alone; and money paid into a bank to the joint account of several persons cannot be drawn out by one of them alone; but, if several joint owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker may treat that as a contract with the one individual dealing with him, and refuse to be accountable to the joint owners of the money.

If a sum of money *in solido* is advanced by several persons, the law raises an implied joint promise of re-payment in favour of all; but, if several sums be advanced separately by each, the law implies a corresponding separate promise in favour of each (*k*). Two joint owners of a sum of money, travelling together on the highway, were robbed of the money; and thereupon they brought a joint action against the hundred, when it was objected that they ought to have sued separately; but the court held that they were properly joined, because they were jointly entitled to the damages to be recovered. If, however, there had been several sums of money, the separate property of the parties robbed, then separate actions should have been brought (*l*). A., B., and C., being assignees under a commission of bankruptcy, incurred legal expenses on account of the bankruptcy to the amount of 208*l.* A. and B. each paid the sum of 104*l.* in discharge of the solicitor's bill, and brought a joint action against C. upon an implied promise for contribution, when it was held that they could not sue jointly, but must each bring a separate action, as the law would imply a separate promise in favour of each, in respect of the money which each had paid on account of C. (*m*). But, although several persons may contribute severally in equal shares towards one entire amount, yet, if their several contributions are put together and advanced as one sum *in solido*, the implied promise of re-payment is a joint promise to all in respect of the entire sum so advanced, and not a several promise to each in respect of their several contributions thereto (*n*). If several persons contribute their several proportions of a sum of money which is to be paid under a special contract to which they are parties, and the money is advanced as a sum *in solido*, and the contract is afterwards abandoned or rescinded, the implied promise to re-fund the money arises in

(*i*) *Cothay* v. *Fennell*, 10 B. & C. 672.

(*k*) *Osborne* v. *Harper*, 5 East, 225; *Driver* v. *Burton*, 17 Q. B. 989; 21 L. J. Q. B. 157.

(*l*) *Winterstoke, &c.*, Dyer, 370, a, pl. 59.

(*m*) *Brand* v. *Boulcot*, 3 B. & P. 235.

(*n*) *May* v. *May*, 1 C. & P. 44.

favour of all (*o*). In a statutory mortgage under the Conveyancing and Law of Property Act, 1881, the implied covenants are joint and several unless the amount is expressed to be secured in distinct shares or sums (*p*). And where in a mortgage or obligation the sum is expressed to be advanced by two or more persons out of money belonging to them on a joint account, the mortgage money due to them is deemed to belong to them on a joint account as between them and the mortgagor or obligor, and the receipt in writing of the survivor or his personal representative is a good discharge (*q*), unless otherwise provided.

Of joint and several liabilities ex contractu.—"Each party to a joint contract," observes Parke, B., "is severally liable in one sense; *i.e.*; if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors" (*r*). It may be laid down as a general rule that, wherever several persons agree to perform a particular act, they are bound jointly and not severally in the absence of express words creating a several liability. If two or more persons covenant generally for themselves, without any words of severance, or that they, or one of them, shall do a particular act, a joint charge is created (*s*). If three are bound in a bond by these words: "We bind ourselves, and each of us jointly," it is a joint obligation; for the word "jointly" makes the obligation joint, which the word "each" cannot make several. Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the performance of the thing contracted to be done (*t*). If several persons sign a promissory note commencing, "We promise to pay," &c., each is liable for the other, and all are liable for the full amount of the note (*u*). There is no absolute rule of equity that a contract which is in terms joint and would be so construed at law is in equity joint and several (*x*). Under the Conveyancing and Law of Property Act, 1881, a covenant, contract, bond, or obligation, under seal, made with two or more jointly to pay money or to make a conveyance, or to do any other act to them or for their benefit, implies an obligation to do the act to or for the benefit of the survivor or any other person to whom the right to sue devolves (*y*).

(*o*) *English* v. *Blundell*, 8 C. & P. 332.

(*p*) 44 & 45 Vict. c. 41, s. 28.

(*q*) S. 61.

(*r*) *King* v. *Hoare*, 13 M. & W. 505; *Addison* v. *Gibson*, 10 Q. B. 106; 16 L. J. Q. B. 165; *Cross* v. *Williams*, 7 H. & N. 675; 31 L. J. Ex. 145.

(*s*) Bacon's Abr. tit. "Obligations."

(*t*) 1 Saund. 291 b, n. 4.

(*u*) *Manley* v. *Boycott*, 2 Ell. & Bl. 46.

(*x*) *Kendal* v. *Hamilton*, 4 Ap. Cas. 504.

(*y*) 44 & 45 Vict. c. 41, s. 60. This

If two or more persons who have joined together in a contract "covenant severally," or become "severally bound," it is (in the absence of express words implying a joint liability) the same as if each of the covenantors had executed a separate bond on the same parchment (z). When the parties engage for the performance of distinct and several duties, mere words of plurality, such as "we bind ourselves," will not make the contract joint (a). Where two persons guaranteed the due payment of an acceptance for 400*l.* "in the proportion of 200*l.* each," it was held that a several liability only was clearly expressed (b).

If A. lets land to B. and C., and they covenant jointly and severally with the lessor to pay the rent, or the like, they are sureties for each other for the due performance of the contract; and it is as competent for each of them to covenant for the other as it is for a stranger to covenant for both, which is a common thing (c). A covenant by two or more persons "for ourselves and each of us," or "for ourselves and every of us," is a joint and several covenant (d). It has been held that, where the lessees in the first covenant of a lease "covenant jointly and severally in manner following," the joint and several liability extends to all the subsequent covenants, in the absence of any express words manifesting an intention to the contrary (e). If several persons enter into a joint bond or promissory note, or other contract, and in the obligatory part make use of the pronoun *I* instead of *we*, they are jointly and severally bound (*f*).

Where three persons agreed to refer certain disputes between them to arbitration, and "jointly and severally" promised and agreed to perform the award, and the arbitrator awarded that two of them should pay a sum of money to a third, and settled and directed the amount that was to be paid by each, it was held that each was liable for the whole amount awarded, as well as for his individual share (g). If a party of friends dine together at a tavern, they are jointly and severally liable for the entire cost of the entertainment, in the absence of circumstances showing an express intention to the contrary. No certain rule of law, however, can be laid down to regulate the joint or several liability

extends to an implied covenant. It applies unless otherwise provided.

(z) *Newton* v. *Blunt*, 3 C. B. 681; *Beaumont* v. *Greathead*, 2 C. B. 494.

(a) *Collins* v. *Prosser*, 1 B. & C. 682.

(b) *Fell* v. *Goslin*, 7 Exch. 185; 21 L. J. Ex. 145.

(c) *Enys* v. *Donnithorn*, 2 Bur. 1190; 1 Wms. Saund. 154, n. 1.

(d) *May* v. *Woodward*, 1 Freem. 248; *Bolton* v. *Lee*, 2 Lev. 56.

(e) *Duke of Northumberland* v. *Errington*, 5 T. R. 522.

(*f*) *Sayer* v. *Chaytor*, 1 Lutw. 696; *Clerk* v. *Blackstock*, Holt, N. P. C. 474; *Hall* v. *Smith*, 1 B. & C. 409; *Ex parte Buckley*, 14 M. & W. 469.

(g) *Mansell* v. *Burredge*, 7 T. R. 352.

upon implied contracts, as the right of action entirely depends upon the varying facts of each particular case, and the inference a jury may be disposed to draw from them. In a case where provisions were furnished for the use of the officers of a regimental mess in camp, Lord Kenyon seems to have thought that the officers were severally liable only in respect of the articles used and consumed by each (*h*).

Joint and several purchases.—If two persons join in giving an order for an undivided parcel of goods, they are jointly liable for the price of them, unless it be proved that there was a separate contract with each (*i*). If they employ an agent to make the purchase, and he purchases an undivided quantity, they are jointly and severally responsible for the price (*k*). But, if there be no agency in the matter, and the purchaser of an undivided parcel of goods subsequently makes a sub-contract with other parties for the taking by them of particular shares in his purchase, this subdivision of his beneficial interest under the original contract does not render the persons claiming under him jointly responsible with himself for the performance of the original contract (*l*).

Contracts with agents.—Rights of the principal.—If the agent who makes the contract contracts only in the name of the principal, intending to bind the latter, and not himself, by the contract, he will have no right of action upon it in his own name, unless he has himself an interest in the contract. Where certain tolls vested in a body of commissioners were let to the defendant, under a memorandum which stipulated that the rent was to be paid to the treasurer of the commissioners at his house in Ely, it was held that the contract was with the commissioners—to pay them through the medium of their officer—and that they alone could sustain an action upon it (*m*). So, where several persons rented a building to be used as a synagogue, and a treasurer was appointed annually by them, whose business it was to let seats and receive the rents for the use of the lessees, it was held, in an action brought by the treasurer for rent due in respect of the seats so let, that the contracts for the occupation of the seats, though in fact made with the treasurer, were, in point of law, made with the lessees who had the title to the synagogue, and that they, and not their servant, the treasurer, were the proper parties to maintain the action (*n*).

Principals contracting as agents.—If a party describes himself

(*h*) *Forster* v. *Taylor*, 3 Campb. 49; Rolle's Abr. 24, 31.

(*i*) *Gibson* v. *Lupton*, 2 M. & Sc. 371.

(*k*) *Gouthwaite* v. *Duckworth*, 12 East, 426.

(*l*) *Coope* v. *Eyre*, 1 H. Bl. 37.

(*m*) *Pigott* v. *Thompson*, 3 B. & P. 147; *Bowen* v. *Morris*, 2 Taunt. 374.

(*n*) *Israel* v. *Simmons*, 2 Stark. 356; *Seignor and Wolmer's case*, Godb. 360.

on the face of a written contract as agent, but does not disclose who his principal is, he may repudiate the agency, and claim the benefit of the contract as the principal, if he is in reality the principal. Although a man cannot, in strict propriety of speech, be agent to himself, yet in a contract of charter-party he may reserve to himself the right to fill either or both of those characters at his election; he may contract as agent of the freighter, whoever that freighter may turn out to be, and may then, if he pleases, adopt that character himself (*p*).

Concealment of agency—Rights of undisclosed principals.—If there is nothing on the face of a written contract to indicate agency, but one of the contracting parties is in reality an agent contracting on behalf of an unknown and undisclosed principal, the latter may, in general, at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it; but he is, of course, bound by all the equities raised by his agent whilst dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself (*q*). If, therefore, a factor entrusted with the possession of goods, sells them as his own with the authority of the true owner, and the purchaser deals with the factor as, and believes him to be, the principal in the transaction, in an action by the true owner for the price the purchaser may avail himself of any set-off which has accrued to him against the factor while he believed the factor to be the principal (*r*). This right of the principal to disclose his real character, and require the fulfilment of the contract with himself personally, exists even in the case of factors who have sold goods for the principal in their own names under a *del credere* commission, provided the general balance of accounts between the principal and the factor is at the time in favour of the former (*s*). And no rule or custom of the Stock Exchange can alter the law in this respect, or in anywise control the legal rights of the principal, although the principal was cognizant of the rule at the time he employed the broker (*t*). Inasmuch, however, as the factor has a lien on the price of the goods in the hands of the buyer to the extent of the balance due to him from the principal on the general account, his commission on the sale

(*p*) *Schmaltz* v. *Avery*, 16 Q. B. 663; 10 L. J. Q. B. 231.

(*q*) *Risbourg* v. *Bruckner*, 28 L. J. C. P. 94; *Carr* v. *Hinchcliff*, 4 B. & C. 547; *Fish* v. *Kempton*, 7 C. B. 692; *Phelps* v. *Protheroe*, 16 C. B. 370; 24 L. J. C. P. 225; *Semenza* v. *Brinsley*, 18 C. B. N. S. 467; *Dresser* v. *Norwood*, 14 C. B. N. S. 574; 17 *ib.* 466.

(*r*) *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38.

(*s*) *Bonzi* v. *Stewart*, 5 Sc. N. R. 1; *Scrimshire* v. *Alderton*, 2 Str. 1182; *Escot* v. *Milward*, 1 Esp. N. P. 108; *Hornby* v. *Lacy*, 6 M. & S. 166; *Drinkwater* v. *Goodwin*, 1 Cowp. 255; *Hudson* v. *Granger*, 5 B. & Ald. 27.

(*t*) *Humphrey* v. *Lucas*, 2 C. & K. 152.

monies advanced, &c., he may insist on payment from the buyer to himself in opposition to the principal, to the extent of the monies so due to him from the latter.

In the case of a contract for the sale of land, specific performance has been decreed, although the purchaser was a mere nominal contractor, purchasing on behalf of, or in trust for, an unknown and undisclosed principal (*tt*). As soon as a purchaser dealing with an unknown agent discovers that he is an agent, and receives an intimation from the principal that the latter intends to look to him for payment, he is not afterwards justified in settling with the agent (*u*). The undisclosed principal who comes forward to adopt the contract must adopt it *in omnibus*; and, if it is coupled with an agreement giving the defendant certain rights as against the agent, the principal must take the contract subject to those rights (*x*).

In certain cases, however, where a contracting party professes to be a principal in the transaction, those who have contracted with him as a principal may refuse to fulfil the contract with any other person than the party with whom they have contracted as a principal. Where, for example, on the face of a charter-party for the hire of a vessel, one of two contracting parties was described as the owner of the vessel, and contracted with the other party in that character, it was held that a third person could not come forward and claim the benefit of the contract on the ground that he was himself the principal and owner of the vessel, and that the person described on the face of the contract as owner was not, in truth, the owner, but his agent. The inducement to the one party to enter into the contract may have been the character, credit, and substance of the other party described as the principal; and the former has a right, therefore, to decline performance of the contract with any other person (*y*). So, in the case of a contract for the sale of land, if it appears that the agent treating for the land contracted as a principal in the transaction, and that the agency was designedly concealed because it was known that the vendor, from personal consideration, would not have sold the land to the undisclosed principal, and the vendor has consequently been deceived, the principal cannot come forward and enforce the contract so obtained.

So, where a merchant, residing in England, orders goods for a foreigner, the usage of trade is that the credit is given to the home agent, who has apparently contracted as the principal, and that the

(*tt*) *Hall* v. *Warren*, 9 Ves. 605.

(*u*) *Cornish* v. *Abington*, 4 H. & N. 557; 28 L. J. Ex. 262.

(*x*) *Ramizotti* v. *Bowring*, 7 C. B. N. S. 856; 29 L. J. C. P. 39.

(*y*) *Humble* v. *Hunter*, 12 Q. B. 310; 17 L. J. Q. B. 350.

foreigner is not bound by, and consequently cannot enforce the contract (z).

To entitle a person to enforce a contract, it must be shown that he himself made it, or that it was made on his behalf by an agent authorised to act for him at the time, or whose act has been subsequently ratified and adopted by him; and the person for whom the agent professes to act must be capable of being ascertained at the time (a). A subsequent ratification, however, may be valid, although the principal was ignorant of the transaction until after it took place; and such a ratification may be made after an action has been commenced upon the contract in the name of the principal (b).

Proof of agency where the contract is in writing.—When the contract is in writing, and the agency is concealed, so that the agent appears on the face of the contract to be the contracting party, and no mention is made of any principal, it has been contended that the admission of oral evidence, to show that the party with whom the contract is so made is in reality only an agent, infringes the well-known rule of law, that the terms of a written contract cannot be varied, or contradicted, or added to, by oral testimony, inasmuch as it is offered to introduce a party to the contract other than the one in whose name it is expressed to be made. But it has been held that the evidence amounts merely to an explanation of the real character of the transaction, and does not in any degree contradict or qualify the provisions and stipulations of the contract itself; and, whilst "it is clear that parol evidence to vary a written contract cannot be received, yet that the parties contracted in the capacities of principals or agents may be explained" (c). In all cases where the character in which parties contract is not defined on the face of the writing (d), "it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such, in making the contract, so as to give the benefit of the contract to the unnamed principal, and this whether the agreement be or be not expressed in writing" (e). But, if the consideration moves from one only of the partners in a firm, such partner may sue alone (f); and upon

(z) *Die Elbinger Actien-Gesellschaft* v. *Claye*, L. R. 8 Q. B. 313; *Hutton* v. *Bullock*, L. R. 8 Q. B. 331; 9 Q. B. 572.

(a) *Watson* v. *Swann*, 11 C. B. N. S. 756; 31 L. J. C. P. 210.

(b) *Ancona* v. *Marks*, 7 H. & N. 686; 31 L. J. Ex. 163.

(c) *Humfrey* v. *Dale*, 26 L. J. Q. B. 137; 27 *ib.* 395.

(d) *Wilson* v. *Hart*, 1 Moore, 50; Taunt. 295.

(e) Parke, B., *Higgins* v. *Senior*, 8 M. & W. 844; *Wake* v. *Harrop*, 30 L. J. Ex. 273; 6 H. & N. 768; 1 H. & C. 202; *Bateman* v. *Phillips*, 15 East, 272; *Garrett* v. *Handley*, 3 B. & C. 462; 4 B. & C. 664; 5 D. & R. 319; 7 D. & R. 144; *Ruppell* v. *Roberts*, 4 N & M. 31; *Cooke* v. *Farquhar*, 17 L. J. Ex. 286; *Spurr* v. *Cass*, L. R. 5 Q. B. 656; 39 L J. Q. B. 249.

(f) *Agacio* v. *Forbes*, 14 Moore, P. C. 171.

negotiable instruments, such as bills of exchange and promissory notes, none but the parties mentioned by their name or firm can be admitted to sue (*g*).

Purchases in the name of one of several joint adventurers.—If several persons send their cattle to a particular salesman, who sells them all to one individual, the only contract is the contract with the salesman alone, and each separate owner cannot bring an action against the purchaser for the price of his cattle (*h*). But, if a number of persons agree to be jointly interested in a purchase which is to be made by one of them separately in his own name, and the contract is made accordingly, all may join in suing for a breach of it (*i*).

Recovery of the money of the principal paid away by the agent.—If the money of the principal has been paid by the agent under circumstances which create a right to recover it back, as for example, by mistake, or on the strength of a false or fraudulent representation, either the agent or the principal may bring an action for "money had and received," and recover the money (*k*). If the money of the principal is lent by the agent, the principal cannot maintain an action against the borrower to recover it back when the time of re-payment arrives, unless it is proved that the principal was in reality the lender; for, if B. lends money to A., and A. makes a further loan of it to C., B. has no right of action against C. to recover it back (*l*). Where a cargo belonging to several joint-owners was sold by their agent, and the money realised by the sale was paid into a bank by such agent in his own name, it was held that the bankers were accountable only to the agent from whom they had received the money (*m*).

Rights of principals upon deeds made by agents.—By an authority in writing under seal, one man may authorise another to enter into, and to execute, contracts under seal in his behalf (*n*); but it depends upon the express terms of such contracts, and upon the mode in which the power given to the agent is exercised, whether the contract, when made, is the contract of the principal or of the agent, or whether it is the contract of neither

(*g*) *Beckham* v. *Drake*, 9 M. & W. 91.

(*h*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 852.

(*i*) *Cothay* v. *Fennell*, 10 B. & C. 671.

(*k*) 1 Roll. Abr. 38, pl. 12.; *Drope* v. *Thaire*, Latch. 126; *Tracy* v. *Veal*, Cro. Jac. 223; *ib.* 224; *Duke of Norfolk* v. *Worthy*, 1 Campb. 337; *Stevenson* v. *Mortimer*, 2 Cowp. 805; *Smith* v. *Sleap*, 12 M. & W. 585; *Bastaple* v. *Poole*, 1 C. M. & R. 410; *Holt* v. *Ely*, 1 Ell. & Bl. 795; *Archer* v. *Bank of England*, 2 Doug. 637.

(*l*) *Sims* v. *Bond*, 5 B. & Ad. 393; *Calland* v. *Loyd*, 6 M. & W. 26; *Cooke* v. *Seeley*, 2 Exch. 746; 17 L. J. Ex. 288.

(*m*) *Sims* v. *Brittain*, 4 B. & Ad. 375; *Pinto* v. *Santos*, 5 Taunt. 447; Martin, B., 8 Exch. 852.

(*n*) Com. Dig. C. 1, C. 5; *Horsley* v. *Rush*, cited 7 T. R. 209; *Harrison* v. *Jackson*, *ib.* 210.

the one nor the other (*o*). If the principal has, by a written authority, sealed and delivered, authorised the agent to enter into and execute the deed, and the covenants contained in such deed are entered into with the principal in express terms, and the agent merely executes the deed in the name of the principal (*p*), then the contract is the contract of the principal. If, on the other hand, the agent is made a party to the deed on behalf of the principal, and the covenants are entered into with the agent as such, then the contract is the contract of the agent.

Liability of undisclosed principals upon simple contracts.—The extent and nature of the authority of an agent may be defined by writing, by oral instruction, or by the course of dealing between the parties. When the authority of an agent is general, it will be construed liberally, but according to the usual course of business in such matters. When the authority is given by parol, and is ambiguous, it is to be construed according to the course of trade in such matters; and, where it is unexpressed, it is to be ascertained by investigating the course of dealing pursued between the several parties to the transactions. Where an express authority is given, an authority is implied combined with it to do all acts which may be necessary for the purpose of effecting the object for which the express authority is given. A general parol authority may be enlarged by parol, or even an additional authority superadded to it by the course of employment of the parties known to and acquiesced in by them. For instance, a merchant may authorise a clerk to accept or indorse bills of exchange for him; but this will not of itself authorise his paying or receiving money due on such bills. But, if, in the course of his employment, the clerk has, with the knowledge of the merchant, been allowed to do so, this will constitute a sufficient authority for that purpose, and will discharge the holders of the bill. An agent, employed to negotiate and conclude contracts, is not thereby authorised to pay or receive money which becomes due under such contracts; but the course of employment may justify the agent in so paying or receiving the money, if known to the principal, and not objected to by him (*q*). If a principal employs an agent in a particular trade or business in which there are established usages regulating the powers and duties of agents, the authority of the agent is regulated by such usages (*r*). We have seen that oral evidence is admissible to show that a party contracting in writing

(*o*) *Jung* v. *Phosphate of Lime Co.*, L. R. 3 C. P. 139.

(*p*) An agent who has an authority under seal to grant leases should merely execute the lease in the name of the principal. *Frontin* v. *Small*, 2 Raym. 1418; *Combe's case*, 9 Co. 76 b.; *M'Ardle* v. *The Irish Iodine Co.*, 15 Ir. Com. L. R. 146.

(*q*) *Pole* v. *Leask*, 28 Beav. 562.

(*r*) *Sweeting* v. *Pearce*, 7 C. B. N. S. 449; 29 L. J. C. P. 265.

was an agent, so as to give the benefit of the contract to an unnamed principal (ante, p. 43); it is in like manner admissible to fix the principal as the party really interested in the matter, and make him liable upon the contract (s). Thus, where, by a bought note containing the terms of a contract for the sale of wool, and also by the invoice, Read appeared to be the buyer of the wool, oral evidence was admitted to show that Read was in reality the agent of Hart, and that Hart had directed the wool to be delivered at a particular spot, and had there received it; and Hart was accordingly made chargeable upon the contract, although he did not appear upon the face of it as a purchaser (t). And in the case of oral agreements, although an agent contracts for the purchase of goods in his own name, and apparently on his own account, so as to make himself personally liable to the vendor for the payment of the price of them, yet the principal, when once discovered, is also liable; but, whether the agreement be oral or in writing, the principal cannot be charged if he has *bonâ fide* paid the agent at a time when the vendor still gave credit to the agent, and knew of no one else as principal (u). If the vendor, at the time he strikes the bargain, knows that the party he is dealing with is an agent, but does not know who the principal is, and consequently debits the agent in the first instance, he may nevertheless, when he finds out the principal, claim payment of the latter (x), provided he makes his election so to do within a reasonable time (y). And the mere fact of filing an affidavit of proof against the estate of an insolvent agent after the undiscovered principal is known to the creditor is not a conclusive election by the creditor to treat the agent as his debtor (z). But, if, at the time the contract of sale is made, the vendor knows that the buyer, though dealing with him in his own name, and pledging his own credit, is in reality an agent, and knows also who the principal is, and, notwithstanding such knowledge, chooses to give credit to the agent, and make him his debtor, he cannot afterwards resort to the principal for payment (a). And, if an agent, having made a contract in his own name, has been sued on it to judgment, no second action is maintainable against the principal (b). If an agent has borrowed

(s) *Higgins* v. *Senior*, 8 M. & W. 844; *Beckham* v. *Drake*, 9 M. & W. 96; 11 M. & W. 317; *Calder* v. *Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224.

(t) *Wilson* v. *Hart*, 7 Taunt. 295; 1 Moore, 50; *Humfrey* v. *Dale*, 27 L. J. Q. B. 390.

(u) *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253. See *Irvine* v. *Watson*, 5 Q. B. D. 414, C. A.

(x) *Kymer* v. *Suwercropp*, 1 Campb. 109; *Thomson* v. *Davenport*, 9 B. & C. 78; *Thomas* v. *Edwards*, 2 M. & W. 216.

(y) *Smethurst* v. *Mitchell*, 1 El. & El. 623; 28 L. J. Q. B. 241.

(z) *Curtis* v. *Williamson*, L. R. 10 Q. B. 57.

(a) *Paterson* v. *Gandasequi*, 15 East, 62; *Thomson* v. *Davenport*, 9 B. & C. 88.

(b) *Priestley* v. *Fernie*, 3 H. & C. 977 34 L. J. Ex. 173.

money for his principal, and the amount has been received by the latter, he may be sued in an action of debt by the lender, although the lender, at the time he lent the money, supposed that the agent was the borrower (c). The burden of proof of agency is on the person dealing with any one as an agent, through whom he seeks to charge another as principal; he must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it (d).

Of the agent's authority to sign writings for the principal.—Except for the purposes described in the first, second, and third sections of the Statute of Frauds, viz., for the purpose of creating leases, estates of freehold, or any uncertain interest in lands, tenements, or hereditaments, other than leases under three years, and except in the case of agents appointed by a corporation to bind the corporate body to certain contracts, a mere verbal authority to the agent will suffice to bind the principal; and, in the great majority of instances, an authority binding one man to the acts of another is raised by implication of law (e). Any person who accredits another by employing him in any particular course of dealing is bound by what has been done by such agent in the course of his usual employment, and is responsible to third parties who have dealt with the agent in reliance upon the power and authority with which he was apparently clothed by the principal (f). If B. has repeatedly signed A.'s name to policies of insurance, or to bills or notes, and A. has subsequently recognised and sanctioned such signatures, the law will imply a general warrant from A. to B., authorising the latter to sign in A.'s name, and A. will continue liable upon such contracts made by B. in the name of A. until the determination of the implied general authority has been publicly announced (g). From repeated instances of employment, the law infers the existence of an implied general authority to the party employed to bind the employer within the limits of the previously recognised dealings (h). But an agent employed specially to sign a contract for his principal upon one particular occasion is not impliedly clothed with any general authority to sign contracts for him. And a person whose agency has been strictly confined to bill transactions has no implied authority to give a guarantee. The liability of the principal is always to be measured

(c) *Samuel* v. *Green*, 10 Q. B. 262.

(d) *Pole* v. *Leask*, 33 L. J. Ch. 155; 28 Beav. 562.

(e) *Ridgway* v. *Wharton*, 6 H. L. C. 296; 27 L. J. Ch. 46.

(f) *Whitehead* v. *Tuckett*, 13 East, 408; *Watkins* v. *Vince*, 2 Stark. 368; Holt, C. J., *Anon.*, 12 Mod. 564; *Attwood* v. *Munnings*, 7 B. & C. 278.

(g) *Neal* v. *Irving*, 1 Esp. 61; *Brockelbank*, v. *Sugrue*, 5 C. & P. 21.

(h) *Todd* v. *Robinson*, R. & M. 217; *Gilman* v. *Robinson*, id. 226; *Hazard* v. *Treadwell*, 1 Str. 506.

by the nature and extent of the previous employment of the agent; and it is the duty of parties dealing with a person who professes to be an agent, but is not notoriously so, to ascertain the nature and extent of his authority before they deal with him. If they neglect so to do, and it afterwards turns out that the agent had no authority, or has exceeded his authority, the principal will not be bound, and the only remedy they can have will be against the agent himself who has misled them (*i*). The fact of a landlord employing a steward to let and manage his property does not clothe the steward with a general authority to grant leases, or to enter into agreements for leases, without the sanction of the landlord, or contrary to his express directions (*k*). And the agent of an insurance company derives no authority, from the mere fact of his agency, to enter into a contract to grant a policy of insurance without the sanction of the directors (*l*). An agent has, in general, no authority to borrow money on account of the principal, so as to render the latter responsible as the borrower, unless it can be proved that the principal has previously sanctioned such a course of dealing on the part of the agent, or has subsequently adopted and ratified the loan (*m*). When an agent has been authorised to accept bills in the name of the principal, he may, it seems, under certain circumstances, select the hand of another person to carry the intention into effect without violating the rule "*delegatus non potest delegare*" (*n*).

Special authority.—An agent intrusted with the performance of a particular duty has an implied authority to do all such incidental acts as are usual and necessary for the purpose of carrying the main object of the principal into effect. Therefore, an agent employed to get a bill discounted, and not restricted as to the mode of doing it, may indorse it in the name of the principal to facilitate its being cashed, and bind the latter by such indorsement. But, if he is expressly ordered by the principal not to put his name to the bill, and has not been employed by the principal as his general agent to discount and indorse bills, the principal cannot be made liable upon it (*o*). And, whenever one person is sought to be charged by the acceptance or indorsement of another, in consequence of the latter having, on previous occasions, drawn and accepted, or indorsed, bills in his name, it must be distinctly shown that he knew of, and had sanctioned, such previous acceptances or indorsements (*p*). The customary mode of indorsement through

(*i*) *Smout* v. *Ilbery*, 10 M. & W. 1; *Polhill* v. *Walter*, 3 B. & Ad. 114.

(*k*) *Collen* v. *Gardner*, 21 Beav. 542.

(*l*) *Linford* v. *Provinc. Horse, &c., In. Co.*, 10 Jur. N. S. 1066.

(*m*) *Hawtayne* v. *Bourne*, 7 M. & W. 599.

(*n*) *Lord* v. *Hall*, 8 C. B. 630; 19 L. J. C. P. 46.

(*o*) *Fenn* v. *Harrison*, 3 T. R. 757.

(*p*) *Davidson* v. *Stanley*, 3 Sc. N. R. 49; *Fearn* v. *Filica*, 7 M. & Gr. 523.

the medium of an agent is by the agent's signing the name of the principal, adding under it "per procuration, A. B.," the agent writing his own name. The arrangement of the words is quite immaterial, provided they plainly express that the indorsement is made by one man on behalf of another—as A. for B., B. by A., or by procuration of A., &c.; but the name of the principal, whether the bill be drawn, accepted, or indorsed by the agent, must appear on the face of the bill, in order to express that the principal does the act through the medium of his agent; for, if the agent merely signs his own name, the principal cannot be made liable upon it (q). When, however, a firm in partnership trade under the name of "A. & Co.," and such partnership name appears on the face of the bill, all the members of the firm are liable upon it, although their individual names do not appear.

Contracts by infant agents.—The principal cannot rely upon any personal incapacity on the part of his agent to contract as a defence against an action brought by those who have dealt with such agent; for the principal who has employed and accredited the agent cannot impugn his own act in the choice he has made. Therefore, although a person under age cannot contract so as to bind himself for anything beyond the necessaries of life, he may nevertheless contract so as to bind his employer (r). "If," observes Pothier, "a merchant has intrusted the management of his business to a minor, he is liable to the obligations arising from the contracts made by such minor, without having any right to oppose his want of age" (s).

Subsequent ratification by the principal.—Although no previous authority may have been given by the principal to the agent to enter into and sign the contract upon which the principal is sought to be charged, yet, if there be subsequent acts of assent or acquiescence on the part of the principal, he is as much liable upon the contract as if a previous authority had been duly given. "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*" (t). If a bill or note be signed without authority by A.'s servant or agent in the name of A., a subsequent promise by the latter to pay the bill is equivalent to a prior authority (u); and, if the proceeds of such a bill are applied to A.'s use or for his benefit, with his knowledge or concurrence, such application of the money obtained upon the bill will of itself

(q) *Barlow* v. *Bishop*, 1 East, 432; *Emly* v. *Lye*, 15 East, 9.

(r) *Watkins* v. *Vince*, 2 Stark. 368.

(s) Pothier (OBLIGATIONS), No. 450; Dig. lib. 14 tit. 3, lex. 7.

(t) *Soames* v. *Spencer*, 1 D. & R. 32; *Maclean* v. *Dunn*, 1 M. & P. 761; *Fitzmaurice* v. *Bayley*, 26 L. J. Q. B. 115.

(u) *Fenn* v. *Harrison*, 4 T. R. 177.

amount to a subsequent sanction and ratification of the act of the agent (*x*). An adoption of the agency as to one part of a contract generally operates as an adoption of the whole transaction; for an act cannot be affirmed as to so much as is beneficial and rejected as to the residue (*y*). "The principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent and with all the consequences which follow from the same act if done by his previous authority" (*z*). But in order to make it binding, the ratification must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances (*a*). The subsequent ratification of the contract by the principal relates back to the time when it was made by the agent; and in those cases where, by the Statute of Frauds, the contract is required to be authenticated by writing, such ratification renders the agent an agent duly authorised to bind his principal under the provisions of the statute at the time the contract was entered into (*b*). But ratification can only be by a person ascertained at the time of the act done, that is, by a person then in existence, either actually or in contemplation of law (*c*). And consequently, a company cannot ratify a contract purporting to have been made on their behalf before they existed as a company (*d*).

Limitation of authority.—If an agent exceeds his authority in cases where it is notorious that the authority of the agent is generally limited, the principal will not be liable beyond the extent of the authority given; and, if the contract is indivisible, the principal will not be liable at all. Thus, where the defendant authorised a broker at Liverpool to underwrite marine policies for him, "not exceeding 100*l.* by any one vessel," and the broker underwrote a policy for 150*l.*, and at Liverpool it is notorious that there is generally a limit fixed between the principal and the broker, though this limit is not disclosed to the public, it was held that the agent had no authority to underwrite for 150*l.*, and that, the

(*x*) *Bolton* v. *Hillersden*, 1 Ld. Raym. 224.

(*y*) *Hovil* v. *Pack*, 7 East, 166.

(*z*) Tindal, C. J., *Wilson* v. *Tummon*, 6 Sc. N. R. 904; *Berwick* v. *Horsfall*, 4 C. B. N. S. 450; 27 L. J. C. P. 193; *Fitzmaurice* v. *Bayley*, 8 Ell. & Bl. 868; As to the subsequent ratification of the acts of bailiffs and others, where the act was originally a trespass, see *Lewis* v. *Read*, 13 M. & W. 834.

(*a*) Willes, J., *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43.

(*b*) 1 M. & P. 177. *Si je contract au nom d'une personne qui ne m'avait point donnée de procuration, sa ratification la fera pareillement reputer comme ayant contracté elle même par mon ministere, car la ratification equipolle à procuration.*—Poth. Traité des Obligations, No. 75.

(*c*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(*d*) *Melhado* v. *Porto Alegre Ry. Co.*, L. R. 9 C. P. 503; *In re Empress Engineering Co.*, 16 Ch. D. 125; but see *contra*, *Spiller* v. *Paris Skating Rink Co.*, 7 Ch. D. 368, per Malins, V. C., following *Touche* v. *Met. Ry. Co.*, L. R. 6 Ch. 671.

contract being indivisible, the assured could recover nothing from the defendant in respect of the policy (*e*).

Publication of revocation of authority.—In order to determine the liability of the principal to third parties who have dealt with the agent in ignorance of the determination of his authority, the principal must make the revocation as notorious to the world at large as the existence of the previous general authority and employment (*f*). When a person has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant that he means to pay ready money in future; it must be given to the tradesman himself, unless the servant is a foreman or manager having the general superintendence of the business (*g*).

Misrepresentation and fraudulent concealment by agents.—"If," observes Lord Abinger, "the clerk of a merchant or tradesman offers goods for sale to a customer, with a representation very material to their value, which representation his master knows to be false, but the clerk supposes to be true, whereupon the customer gives double the real value of the goods, the contract ought to be dealt with in the same way as if the master himself had made the representation" (*h*). If the representation forms part of the contract, the principal must take the contract in its entirety. "Wherever," observes Lord Kingsdown, "an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot approbate and reprobate the contract. He must adopt it altogether, or not at all; he cannot at the same time take the benefit which it confers and repudiate the obligation which it imposes" (*i*). "Whatever the previous authority of the agent," further observes Wilde, B., "whatever the principal's own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether. There are, no doubt, many frauds committed by agents which do not bind their principals; but I hold that the statements of the agent which are involved in the contract as its foundation or inducement are in law the statements of the principal" (*k*).

Liabilities of principals on contracts under seal.—If, in a

(*e*) *Baines* v. *Ewing*, L. R. 1 Ex. 320; 35 L. J. Ex. 194.

(*f*) Pothier, Tr. des. Ob. No. 449.

(*g*) *Gratland* v. *Freeman*, 3 Esp. 85.

(*h*) 6 M. & W. 385; *Schneider* v. *Heath*, 3 Campb. 508; *Everett* v. *Desborough*, 3 M. & P. 204; Holt, C. J., *Herne* v. *Nicholls*, 1 Salk. 289; Ld. Ellenborough, *Crockford* v. *Winter*, 1 Campb. 127; *Taylor* v. *Green*, 8 C. & P. 316; *Wright* v. *Crookes*, 1 Sc. N. R. 700; *Wheelton* v. *Hardisty*, 8 Ell. & Bl. 260.

(*i*) *Bristowe* v. *Whitmore*, 9 H. L. C. 391; 28 L. J. Ch. 801; and see the judgment of Wilde, B., *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J. Ex. 340.

(*k*) Wilde, B., *Udell* v. *Atherton*, 7 H. & N. 172; 7 Jur. N. S. 779.

contract under seal, the principal is made to covenant in his own name, and not in the name of his agent, and the deed is executed in the name of the principal, and the agent's authority to execute the deed is under seal, the principal is liable upon it just the same as if he had personally sealed and delivered the instrument; but, if the agent has covenanted in his own name on behalf of the principal, the action may be brought against the agent, who, in such a case, constitutes himself the trustee of the principal (*l*). The principal is not, in any case, liable upon a deed, unless the authority of the agent to make and execute the deed is under seal (*m*); but there is an exception in the case of two joint contractors, one of whom, it has been held, may execute a deed for himself and the other without an authority under seal, provided the execution be made "for himself and the other *in the presence* of that other" (*n*).

Warranties by agents.—It has been held that a buyer who takes a warranty from a known agent or servant, professedly selling on behalf of his principal or master, takes the warranty at the risk of being able to prove that the agent had the principal's authority for giving the warranty, and that the law clothes the known servant intrusted to sell with no implied authority to warrant, unless such servant is the general agent of a tradesman employed in the trade or business of buying and selling (*o*); but, although a vendor who employs an agent to sell gives the latter no authority to warrant, yet, if the agent does warrant, and thereby obtains a largely enhanced price, which never could have been procured if the warranty had not been given, it seems inconsistent with all ordinary principles of law and justice to allow the principal to retain the money and repudiate the warranty by which it was obtained. Finding that the agent had exceeded his authority by giving a warranty, the principal is doubtless entitled to repudiate the transaction altogether; but, if he receives the money, and refuses to return it after he has had notice of the warranty, he surely ought to be held to have ratified and adopted the warranty (*p*).

If a person puts goods into the custody of another whose common business it is to sell, he thereby confers upon him an authority to do all that is necessary and usual to be done to obtain a purchaser (*q*); and, therefore, if the servant of a horse-dealer with express directions not to warrant does warrant, the master is

(*l*) Co. Litt. 258 n.; *Anon.*, Moore, 70, pl. 19; *White* v. *Cuyler*, 6 T. R. 176.

(*m*) *Steiglitz* v. *Egginton*, 1 Holt, 141.

(*n*) *Ball* v. *Dunsterville*, 4 T. R. 313.

(*o*) *Brady* v. *Tod*, 9 C. B. N. S. 592; 30 L. J. C. P. 223; *Udell* v. *Atherton*, *ante*, p. 51, qualifying *Alexander* v. *Gibson*, 2 Campb. 555; *Helyear* v. *Hawke*, 5 Esp. 71.

(*p*) Parke, B., *Cornfoot* v. *Fowke*, 6 M. & W. 373; *Hern* v. *Nicholls*, *ante*, p. 51; *Amory* v. *Delamirie*, 1 Str. 505.

(*q*) *Dingle* v. *Hare*, 7 C. B. N. S. 145; 29 L. J. C. P. 148.

bound, because the servant having a general authority to sell is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed (r). Here the maxim *respondeat superior* applies; and the principal has his remedy against the agent for his misconduct (s). Where a goldsmith's apprentice sold an ingot of gold and silver upon a special warranty that it was of the same value per ounce with an assay then shown, and it appeared that he had forged the assay, and that the ingot was made out of a lodger's plate, which he had stolen, it was held that the master was answerable for the fraud of the apprentice (t), on the ground that the sale took place in the course of business in the master's shop (u). Where the owners of a vessel, which had once been classed A 1 at Lloyd's, authorised their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner in all respects as he should think proper, and generally to represent the owners in relation to her management or sale as fully as if the owners were personally present, and to do all things necessary for that purpose though the same were not especially mentioned, it was held that the agent had authority to enter into a charter-party with a warranty that the ship was at the time of the charter-party A 1 at Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given (x).

If an agent employed by the indorsee of a bill to get it discounted warrants the bill to be a good bill, and receives cash for it on the strength of the warranty, and hands over the money to his principal, and the bill turns out to be a piece of worthless paper, the principal cannot retain the money (y). It was his own fault, as Lord Holt has observed, to repose a trust in unworthy hands, and he ought not to be allowed to derive a profit from the misconduct of his own servant to the prejudice of an innocent purchaser (z).

Representations by agents not amounting to a warranty.—It is not every affirmation and representation which will amount to a warranty. If the fact concerning which the representation is made lies as much within the knowledge of the one party as the other, and the agent making the statement merely says what he

(r) Bayley, J., *Pickering* v. *Busk*, 15 East, 45; *Howard* v. *Sheward*, L. R. 2 C. P. 148; 36 L. J. C. P. 42.
(s) Ld. Kenyon, C. J., *Fenn* v. *Harrison*, 3 T. R. 760.
(t) *Grammar* v. *Nixon*, 1 Str. 653.
(u) Jervis, C. J., *Coleman* v. *Riches*, 16 C. B. 115.
(x) *Routh* v. *Macmillan*, 33 L. J. Ex. 38.
(y) *Fenn* v. *Harrison*, 3 T. R. 177.
(z) *Coleman* v. *Riches*, 16 C. B. 120; 24 L. J. C. P. 125; *Cornfoot* v. *Fowke*, 6 M. & W. 381.

believes to be true, there is no warranty on the part of the agent of the truth of what he states; it is understood only, under such circumstances, that he does not wilfully state that which he knows to be false, either to mislead or to lull to sleep the vigilance of the other contracting party. And, if there is, under such circumstances, a defect unknown to the party making the statement, and which the other party had as good means of discovering as the agent himself, the rule of *caveat emptor* applies (*a*). A servant, serving in a shop, and demanding only the ordinary market price of the wares he sells, may be asked this and that question as to the fitness of the different articles for particular purposes, and his answers to such queries would, in most instances, be considered the mere expression of his own individual judgment and opinion, given by way of guidance and advice to the purchaser, and not as warranties binding the principal to the truth of his representations.

Representations forming no part of the contract with the principal.—In order to charge the principal, it must not only be shown that the representation was made at the time the contract was entered into, but that it formed part of the foundation on which the contract rests (*b*). Therefore, if an agent employed by his principal to find parties willing to contract, and then to send them to the principal to conclude the bargain with him, makes in the course of conversation with them statements and representations respecting the subject-matter of the contract which are not afterwards included in the contract entered into with the principal himself, the latter will not be bound by them (*c*). Thus, where a house-agent, on going to show a house, was asked if there was anything objectionable about the house, to which he replied, "Nothing whatever," and, after this conversation, the parties differed about the rent, and the matter was then referred to the principal, and a contract for the letting and hiring of the house was subsequently entered into with the principal himself, which contract made no mention of the previous representation of the agent, it was held that the principal was not bound by the representation (*d*).

Purchases by a servant in the name of his master.—If a man sends his servant with ready money to buy goods, and the servant buys upon credit, the master is not chargeable. But, if the servant "usually buys for the master upon tick, and the servant buys some things without the master's order, yet, if the master were trusted by the trader, he is liable" (*e*). "If goods," observes

(*r*) *Fuller* v. *Wilson*, *Wilson* v. *Fuller*, 3 Q. B. 58, 72; *Collins* v. *Evans*, 5 *ib.* 828.

(*b*) *Helyear* v. *Hawke*, 5 Esp. 73.

(*c*) *Knight* v. *Barber*, 16 M. & W. 69.

(*d*) *Cornfoot* v. *Fowke*, 6 M. & W. 358.

(*e*) Holt, C. J., Show. 95; *Southby* v. *Wiseman*, 3 Keb. 625; *Nickson* v. *Brohan*, 10 Mod. 111; *Pearce* v. *Rogers*, 3 Esp. 214.

Lord Ellenborough, "are taken up by the master, and the money given *afterwards* to the servant to pay, I am inclined to think the master liable, if the servant have not paid over the money; for he has given the servant authority to take up goods upon credit. It is therefore material to see when the money was given. If the servant were always in cash beforehand to pay for the goods, the master is not liable, as he never authorised him to pledge his credit; but if the servant were not so in cash, the master gave him a right to take up the goods on credit, and will be liable if the servant has not paid the plaintiff, though he may have received the money from the defendant, his master" (*f*). If a master sends forth his coachman into the world wearing his livery to hire horses which the master afterwards uses, knowing of whom they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire, although he may have contracted with his coachman that the latter shall provide horses, and may have paid him a large salary for the purpose (*g*). If the father of a family puts his children under the protection of servants, and lives himself at a distance from them, the servants have an implied authority to procure necessary medical advice in case of sudden illness or accident (*h*). But, if the plaintiff has shown a want of due caution, or has trusted the servant to an improper extent, the master will not be liable (*i*).

Authority of foremen and managers.—A foreman entrusted with the general management of a trade or business has an implied general authority from his employer to enter into all such contracts as are usually and necessarily entered into in the ordinary conduct and management of the business (*k*). Where the foreman of a saw-mill took an order from the plaintiff for a large quantity of Scotch fir staves, and agreed to have them ready for delivery within a particular period, it was held that his master was responsible for the non-fulfilment of the contract, although no particular authority from the master to the servant to enter into that contract could be proved (*l*). If the acts of agency have been exercised in so open and public a manner that it may reasonably be inferred that the principal must have been cognizant of them, the principal will be liable, although no express authority can be proved. If the agent has published advertisements, and thereby induced parties to con-

(*f*) *Rusby* v. *Scarlett*, 5 Esp. 76; Pothier, Obl. No. 456; Arrêt du Journal des Audiences, tom. 5; *Miller* v. *Hamilton*, 5 C. & P. 433.

(*g*) *Rimell* v. *Sampayo*, 1 C. & P. 254.

(*h*) *Cooper* v. *Phillips*, 4 C. & P. 584.

(*i*) *Stubbing* v. *Heintz*, 1 Peake, 66.

(*k*) *Summers* v. *Solomon*, 26 L. J. Q. B. 301.

(*l*) *Richardson* v. *Cartwright*, 1 C. & K. 328.

tract with him, the principal will be bound by the publicity of the announcement, although no actual authority has been given. "It is a question between the principal and his agent; and the public has nothing to do with it" (*m*). Wherever the principal, by his conduct, has held out the agent to the parties dealing with him as having a general power to act in the premises, his acts bind the principal; and the liability of the latter upon the contract cannot be qualified by the existence of any private instructions which the agent may have exceeded (*n*). Thus, where J., carrying on business at one place, and having a branch establishment at another, placed the latter under the management and superintendence of B., as his agent, and the branch business was carried on in the name of B. & Co., but B. had no authority to accept bills, and B. nevertheless exceeded his authority by the acceptance of a bill of exchange, it was held that J. was liable thereon, it not being in his power to divest his agent, by any secret reservation, of the powers incidental to the character of principal which he had empowered him to assume (*o*).

Telegraph clerks.—A telegraph clerk is only authorised to transmit a telegraphic message in the terms in which the sender delivers it; and, if he makes a mistake in the transmission of the message, the sender is not bound by it (*p*).

Authority of shipmasters.—Masters of ships have an implied general authority to bind the owners for necessary repairs done or supplies furnished to the vessel under their command; and by the word "necessary" is comprehended such as are fit and proper for the vessel upon her voyage, and such as a prudent owner himself, if present, might be expected to have ordered (*q*). He may also pledge the credit of the owners for such things as are absolutely necessary for the due prosecution of the voyage (*r*). If it be necessary to pay harbour dues, or pilotage, or the like, in ready money, and the master has not been furnished with the necessary funds, he has an implied authority to borrow money, and to bind the owners by a contract for that purpose. But this authority does not extend to cases where the owner can himself personally interfere, as in a home port, or in a port in which he has beforehand appointed an agent who can do the thing required (*s*). If the vessel is in a foreign port where the owner has no agent, or in an

(*m*) *Runquist* v. *Ditchell*, 3 Esp. 64.

(*n*) Ellenborough, C. J., 15 East, 42; *Smethurst* v. *Taylor*, 12 M. & W. 554; *Smith* v. *M'Guire*, 3 H. & N. 554; 27 L. J. Ex. 465; *Edmunds* v. *Bushell*, 35 L. J. Q. B. 20; Pothier, Traité des Obligations, No. 79, 82.

(*o*) *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97; 35 L. J. Q. B. 20.

(*p*) *Henkel* v. *Pape*, L. R. 6 Ex. 7; 40 L. J. Ex. 15.

(*q*) *Webster* v. *Seekamp*, 4 B. & Ald. 352; *Weston* v. *Wright*, 7 M. & W. 396; *Stainbank* v. *Shepard*, 13 C. B. 441; *The Aaltjee Willemina*, L. R. 1 Adm. 107.

(*r*) *Robinson* v. *Lyall*, 7 Price, 592.

(*s*) *Gunn* v. *Roberts*, L. R. 9 C. P. 331.

English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, the occasion authorises the master to pledge the credit of the owner, and make him liable upon the contract. But in all these cases the things must be absolutely necessary to enable the vessel duly to prosecute the voyage (*t*). And the owners will not be bound, if the money is borrowed, not upon their credit, but upon the private credit of the master himself (*u*). The liability of the owner depends, not on his ownership of the vessel merely, but on his having authorised the master to bind him, either expressly, or by his having held out the master as his master, and having thereby induced the vendor to supply the necessaries on the credit of the owner (*x*). The master has also, it seems, authority to settle a claim for demurrage made by him for the detention of the vessel at a foreign port (*y*).

Limitation of the authority of shipmasters.—"The authority of the shipmaster is subject to several well-known limitations. He may make contracts for the hire of the ship, but cannot vary those which the shipowner has made" (*z*). He may take up money in foreign ports, and under certain circumstances at home, for necessary disbursements and for repairs, and bind the owners for repayment; but his authority is limited by the necessity of the case; and he cannot make them responsible for money not actually necessary for those purposes, though he may pretend that it is (*a*). He may make contracts to carry goods on freight, but cannot bind his owners by a contract to carry freight free. So with regard to goods put on board, he may sign a bill of lading, acknowledging the nature, quality, and condition of the goods; but his authority to give bills of lading is limited to such goods as have been actually put on board. A party, therefore, taking a bill of lading either originally or by endorsement, for goods which have never been put on board, is bound to show some particular authority given to the master to sign it, in order to charge the shipowner upon it (*b*); nor can the master draw bills of lading making the freight payable otherwise than to the shipowner (*c*). The shipmaster has no authority to sell any part of the ship or cargo, except in a case of absolute necessity (*d*), or where the sale is warranted

(*t*) As to home ports, see the 19 & 20 Vict. c. 97, s. 8; *Arthur* v. *Barton*, 6 M. & W. 143; *Johns* v. *Simons*, 3 Q. B. 425; *Stonehouse* v. *Gent*, *ib.* 431, n.; Poth., Obl., No. 448.

(*u*) *Thacker* v. *Moates*, 1 Mood. & Rob. 80.

(*x*) *The Great Eastern*, L. R. 2 Ad. & E. 88.

(*y*) *Alexander* v. *Dowie*, 25 L. J. Q. B. 281.

(*z*) *Harris* v. *Carter*, 3 Ell. & Bl. 559.

(*a*) *Mackintosh* v. *Mitcheson*, 4 Exch. 175; *Edwards* v. *Havill*, 14 C. B. 107; *Organ* v. *Brodie*, 10 Exch. 450.

(*b*) *Grant* v. *Norway*, 10 C. B. 687; 20 L. J. C. P. 93; *Hubbersty* v. *Ward*, 8 Exch. 330; *Coleman* v. *Riches*, 16 C. B. 104; 24 L. J. C. P. 125.

(*c*) *Reynolds* v. *Jex*, 34 L. J. Q. B. 251.

(*d*) *Freeman* v. *E. I. Co.*, 5 B. & Ald.

by the law of the country in which it takes place (*e*); nor has he any authority to hypothecate the ship or to borrow money upon the credit of the shipowners, after the work has been done, for the purpose of paying the debt due for it (*f*). The master of a disabled ship has power under certain circumstances to forward the cargo by another ship; but he is not the agent of the owners of the cargo, so as to render them responsible for his act in so doing, where he has the opportunity of communicating with them or their agent, and neglects to avail himself of it (*g*). Where the master of a ship contracts as such in a foreign port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and the flag of a ship is notice to all the world that his implied authority is limited by the law of that flag (*h*).

When shipowners have appointed a shipmaster and placed him in charge of the vessel, and have been in the habit of paying for stores and repairs ordered by such master, the general authority of the latter cannot be revoked or circumscribed by any private contract between the master and the owners, of which the persons dealing with the master are ignorant. Where, therefore, by articles of agreement between the owners and the master of a vessel, the master was to have and employ the vessel for his own sole benefit and advantage for eleven years, at a certain rent, and was at his own cost and charge to repair the vessel, tackle, rigging, &c., it was held that the plaintiffs, who had supplied the vessel with cables by order of the master, without any notice of the contract, were entitled to recover the price thereof from the owners (*i*).

Where the ship is let to freight, and the charter-party or contract of affreightment operates as a demise or bailment of the ship to the charterer, so as to clothe him with the possession as well as the use of the vessel, and constitute him the temporary owner, the master becomes the agent of the charterer; and the latter, and not the registered owner, is then responsible for stores ordered for the use of the vessel by the master in the course of his employment by the charterer (*k*). The shipowner, however, is *primâ facie* liable for repairs and stores ordered for his vessel by

621; *The Bonita*, 30 L. J. Adm. 145; *The Gipsy*, 33 L. J. Adm. 195.

(*e*) *Cammell* v. *Sewell*, 5 H. & N. 728; 29 L. J. Ex. 350.

(*f*) *Beldon* v. *Campbell*, 8 Exch. 886; 20 L. J. Ex. 342.

(*g*) *Gibbs* v. *Grey*, 2 H. & N. 22; 26 L. J. Ex. 286; *Duranty* v. *Hart*, 33 L. J. Adm. 116.

(*h*) *Lloyd* v. *Guibert*, 33 L. J. Q. B. 241; *The Karnak*, L. R. 2 P. C. 505; 38 L. J. Adm. 57; but see *Greer* v. *Poole*, 5 Q. B. D. 272.

(*i*) *Rich* v. *Coe*, 2 Cowp. 636; *Preston* v. *Tamplin*, 2 H. & N. 684.

(*k*) *Fraser* v. *Marsh*, 13 East, 238; *Briggs* v. *Wilkinson*, 7 B. & C. 34; 9 D. & R. 871; *Reeve* v. *Davis*, 1 Ad. & E. 312.

the master. If, therefore, on looking to the registry, the defendant is found to be the legal owner, a *primâ facie* liability is established against him. But the register is not conclusive; for the question is a pure question of contract and credit, which, like all other questions of goods sold or work done, must be decided by a jury upon consideration of all the circumstances.

If the charter-party operates, as it generally does, merely as a contract for the carriage of merchandise, the shipowner retaining the possession and control of the vessel through the medium of his servants and agents, he cannot repudiate the agency of the master acting as such with his knowledge. Therefore, a shipowner who charters his vessel to another, but not so as to give up possession, is liable for a breach of the contract contained in a bill of lading signed by the master, such as injury to the goods by improper stowage, if at the time of shipment the shipper had no notice of the charter (*l*). So, where the defendant had never employed the plaintiff himself to do repairs to his vessel, but was the legal owner upon the register, and was in concurrent possession of the ship with a party to whom he professed to have sold it, and was fully aware that the shipmaster who was appointed by the latter was giving orders for repairs, and some of the defendant's servants were on board and in charge of the vessel, it was held that the defendant was responsible for repairs done to the ship by the plaintiff upon the order of the shipmaster (*m*). Where, on the other hand, the shipowner had sold his shares in a vessel, and had ceased to be beneficially interested in the ship, and was not known as a part owner to the party doing the repairs until after the repairs had been ordered and done, but his name continued on the register, it was held that he was not liable for such repairs, unless it could be shown that the master who gave the order for them had an express or implied authority to bind him (*n*). A part owner of a ship has no implied general authority to bind his co-owners for repairs (*o*). Where a party is mortgagee of a ship only, taking merely the security of the ship without intending to incur any of the liabilities incident to ownership, the bare circumstance of his being entitled to the vessel, and to the earnings of the ship, will not make the master his agent so as to bind him in respect of contracts entered into by the master after the date of the mort

(*l*) *The St. Cloud*, 1 B. & L. 4; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86; 36 L. J. Q. B. 58; *The Figlia Maggiore*, L. R. 2 A. & E. 106; 37 L. J. Adm. 52; *The Nepoter*, L. R. 2 Adm. 375; 38 L. J. Adm. 63.

(*m*) *Frost* v. *Oliver*, 2 Ell. & Bl. 315; 22 L. J. Q. B. 353.

(*n*) *Curling* v. *Robertson*, 8 Sc. N. R. 19; *Mitcheson* v. *Oliver*, 5 Ell. & Bl. 444; 25 L. J. Q. B. 39; and see *Hibbs* v. *Ross*, L. R. 1 Q. B. 534; 35 L. J. Q. B. 193.

(*o*) *Brodie* v. *Howard*, 17 C. B. 118; 25 L. J. C. P. 57.

gage (*p*). A mortgagee in possession of a ship is not liable for necessaries supplied, unless the master in ordering them acted as his agent (*q*).

A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other (*r*).

Authority of ship's husband.—A ship's husband who has authority from the owners to make a charter-party by which commission on freight, primage, and demurrage, is to be due to the charterers, has not power to bind the owners by making an agreement to cancel the charter-party, and pay the charterers a sum of money in lieu of commission, although such agreement is for the benefit of the owners (*s*).

Authority of brokers.—One who employs a broker to transact business for him in a general market, as, for instance, upon the Stock Exchange, impliedly authorises him to deal according to the general and known usages and customs of that market, although he may not himself be aware of their existence. But, when an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to be aware of it; and, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage (*t*).

Ship brokers.—If a broker, who is authorised to advertise a ship for a voyage, warrants by his advertisement that she shall sail with convoy, the shipowners are bound by the warranty, although in giving it the broker may have exceeded his authority (*u*).

Authority of counsel.—Counsel retained to conduct a cause is clothed with an apparent authority to do everything belonging to the conduct of it, which, in the exercise of his discretion, he thinks best for the interest of his client; and, if, acting within the limits of this apparent authority, he enters into an agreement with the counsel for the other side as to the cause, this agreement is binding on the client. But counsel has no right to manage a cause against the will of his client or to make a binding agreement as

(*p*) *Myers* v. *Willis*, 17 C. B. 103; 18 *ib.* 886; 25 L. J. C. P. 255; *Hackwood* v. *Lyall*, 17 C. B. 124; *Mackenzie* v. *Pooley*, 11 Exch. 638; 25 L. J. Ex. 124.

(*q*) *The Troubadour*, L. R. 1 Adm. 302.

(*r*) *Priestley* v. *Fernie*, 34 L. J. Ex. 173.

(*s*) *Thomas* v. *Lewis*, 4 Ex. D. 18.

(*t*) *Grissell* v. *Bristowe*, L. R. 3 C. P. 112; 38 L. J. C. P. 10.

(*u*) *Runquist* v. *Ditchell*, 2 Campb. 556, n.

to it, if the other side is informed that this apparent general authority has been, in fact, limited (*x*).

Authority of solicitors.—The force of a solicitor's retainer is at an end, and his power to bind his client by a compromise ceases when judgment is recovered (*y*); but, if, after judgment, the relation of solicitor and client is continued or re-created, the former will have authority to bind the latter by a compromise (*z*).

Simple contracts entered into by agents in their representative character, on behalf of a principal whose name is disclosed at the time of contracting, must, as a general rule, as we have already seen, be enforced by the principal; and the agent cannot bring an action upon them in his own name (*a*), unless he can show that he has an interest or a special property in the subject-matter of the contract, or unless he has so contracted as to make himself personally responsible for the fulfilment of the contract (*b*). But, if a bill of exchange or a promissory note is made payable to one man for "the use," or "for and on behalf," or for the benefit of, another person named on the face of the bill or note, the payee is the proper party to bring an action upon the instrument (*c*). When a written contract has been entered into by an agent on behalf of his principal, and the agent's representative character is not disclosed on the face of such written contract, the agent is entitled to maintain an action thereon, unless the principal interferes to prevent him (*d*). So, if an agent carries on trade for his principal in his own name, and ostensibly on his own account, he is entitled to maintain an action in respect of goods sold by him in the course of that trade, unless the real principal interferes, and asserts his right to the sum due (*e*). Factors generally sell the goods of their principal in their own names, and are alone known throughout their dealings and transactions to the purchaser; and they are consequently entitled to maintain an action for the price. "Inasmuch as the agent is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person in whose behalf it was made. In such cases you may bring your action either in the name of the person by whom, or of the party for whom, the contract was made" (*f*).

(*x*) *Strauss* v. *Francis*, L. R. 1 Q. B. 379; 6 B. & S. 365; 35 L. J. Q. B. 133.

(*y*) *Macbeath* v. *Ellis*, 4 Bing. 578.

(*z*) *Butler* v. *Knight*, L. R. 2 Ex. 109.

(*a*) *Fairlie* v. *Fenton*, L. R. 5 Ex. 172; 39 L. J. Ex. 107; *ante*, p. 40.

(*b*) *Cooke* v. *Willson*, 1 C. B. N. S. 153; 26 L. J. C. P. 15; *Fawkes* v. *Lamb*, 31 L. J. Q. B. 98; *post*, p. 62.

(*c*) *Evans* v. *Cramlington*, Carth. 5; 2 Ventr. 307; *Eeckham* v. *Drake*, 9 M. & W. 92, 96.

(*d*) *Schmaltz* v. *Avery*, 16 Q. B. 659; 20 L. J. Q. B. 228.

(*e*) *Gardiner* v. *Davis*, 2 C. & P. 49.

(*f*) Bayley, J., *Sargent* v. *Morris*, 3 B. & A. 181; *Clay* v. *Southern*, 7 Exch. 717.

Right of action of factors, auctioneers, and policy-brokers.— If the agent himself has an interest or a special property in the subject-matter of the contract, he is entitled to maintain an action upon it. Where a broker has advanced money on the credit of a cargo consigned to him by his principal for sale, he is entitled to an action in his own name against the buyer, although the sale note given by the broker mentions the name of the principal (*g*); and the buyer in such a case cannot set off a debt due to him from the principal in an action by the agent. But, if, by the introduction of the name of the principal into the contract, the defendant has been prejudiced, he will be entitled to make use of that circumstance as a defence. So, too, in the sale of goods by a factor, although the principal may be named or known at the time of the sale, yet, as the factor has a claim on the price of the goods in the hands of the buyer for the balance due to him on the general account with his principal, he has a right to require payment of the price, to the extent of such general balance, to himself, and not to the principal (*h*). An auctioneer has a special property in goods which he is employed to sell, with a lien for the charges of the sale, the commission, &c.; and he may, therefore, maintain an action against a buyer for the price of goods sold by him, although the sale was at the house of the principal, and the goods were publicly known to be the property of the latter (*i*). He has a lien also on the proceeds of the sale as well as on the specific article sold, and seems to be in the same position as a factor who sells goods upon which he has advanced money, so that it is no answer to an action by an auctioneer for the price of goods sold by him to say that before action the defendant paid the price to the principal (*k*). But it is otherwise if the auctioneer's charges have been paid before action, and the purchaser has a good answer to any action by the vendor for the price (*l*); and, if goods are sold, to be paid for at a future period, and are delivered to the buyer, without notice from the agent that he has any lien or claim on the price for duty, commission upon selling, or the like, and the buyer, in the absence of such notice, settles with the principal, the agent's right of action is destroyed (*m*). A policy-broker who effects a policy of insurance in his own name, as agent, at the same time declaring for whose use, benefit, or interest the same is made, is entitled to an action on the policy, inasmuch as, by the usage of trade, he has a lien upon it for the premium, which is generally paid by the broker, for

(*g*) *Atkyns* v. *Amber*, 2 Esp. 493.
(*h*) *Drinkwater* v. *Goodwin*, Cowp. 255.
(*i*) *Williams* v. *Millington*, H. Bl. 81; *Wolf* v. *Horne*, 2 Q. B. D. 355.
(*k*) *Robinson* v. *Rutter*, 4 Ell. & Bl. 956; 24 L. J. Q. B. 250.
(*l*) *Grice* v. *Kenrick*, L. R. 5 Q. B. 340; 39 L. J. Q. B. 175.
(*m*) *Coppin* v. *Walker*, 7 Taunt. 242.

his commission, and for the general balance due to him on the account between himself and his principal.

Repudiation of the contract by the principal.—When an agent has entered into a contract of sale for an unnamed and unknown principal, it is no defence to an action brought by the agent upon that contract, to say that the principal afterwards repudiated it (*n*).

Pretended assumption of agency.—When a man has assumed to himself the character of an agent to another, whom he names as his principal, the law will not permit him to shift his situation, and bring an action as the principal and party really interested in the contract, without giving to the defendant previous notice of the situation in which he stands. Having misled the defendant by assuming a character and situation which did not belong to him, he is bound to undeceive him before bringing an action (*o*). But, if the principal is not named on the face of the contract, the party professing to contract as agent for an unnamed principal is not precluded from saying at any time, "I am myself that principal," and from asserting his rights in that character (*p*).

Right of action of agents on contracts under seal.—If the agent contracts under seal in his own name on behalf of his principal, he may sue upon the contract, although his representative character is disclosed on the face thereof; but, if the principal is made to covenant in his own name, and not the agent for him and in his behalf, the agent has then, of course, no right of action at all upon the contract.

Liabilities of agents on simple contracts.—Whenever an agent contracts in his own name for the fulfilment of a particular act or duty, without any qualification of his liability on the face of the contract, he is personally responsible for the fulfilment of the act undertaken to be done, although he was known to be acting only as an agent for some third party (*q*), unless it was expressly agreed that he was not to incur any personal liability upon the contract (*r*). Where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally; and, in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal (*s*); and the use of the words "as agent for" in the

(*n*) *Short* v. *Spackman*, 2 B. & Ad. 962.

(*o*) *Bickerton* v. *Burrell*, 5 M. & S. 383; *Rayner* v. *Grote*, 15 M. & W. 359.

(*p*) *Schmaltz* v. *Avery*, *ante*, p. 61.

(*q*) *Reid* v. *Draper*, 6 H. & N. 813; 30 L. J. Ex. 268.

(*r*) *Wake* v. *Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

(*s*) *Thompson* v. *Davenport*, 2 Sm. Lead. Cas. 6th ed. p. 344.

body of the contract does not prevent the liability of a party who signs as principal (*t*). For the words "as agent" may be merely words of description, but if the words "on account of" are used there is no ambiguity, and the intention to act for another is clear (*u*). So, whenever, in the body of a simple contract in writing, the agent contracts in his own name, and signs his name to the contract, he may render himself personally responsible for the fulfilment of the contract, although he declares that he contracts on behalf of a named principal (*x*), or that he signs by procuration of, or as agent for, a named principal (*y*). If it appears from the general context of the written instrument that the agent himself was to be responsible for the due fulfilment of the contract, the words "for and on behalf" or "as agent for," will be deemed to be mere matter of description, and will not exempt the agent from personal liability; and there is no distinction in this respect between deeds and simple contracts (*z*). Whether he is so liable depends upon the terms of the particular contract, construed in connexion with the surrounding circumstances and the relative situations of the parties at the time the contract was entered into (*a*). If, on the face of the contract, there is an express disclaimer of personal liability on the part of the agent, effect will be given to such disclaimer, although the agent has contracted in his own name on behalf of an unnamed principal; but the agent must have had authority to enter into the contract on behalf of his principal, and must have intended to contract so as to bind the latter (*b*). Where an auctioneer subscribed a memorandum, indorsed on particulars of sale, to the following effect:—"I, E. Driver, as agent for the vendor, hereby agree to sell to the above-named R. H. Gaby (the plaintiff) the lot thirty-eight referred to in the above memorandum," it was held that the auctioneer had not thereby engaged to be personally responsible for the making out of a good title to the estate (*c*). So, where an auctioneer, as agent for the landowner, promised in his own name, on behalf of the landowner, that he (the auctioneer) would make out a title, and, the agreement having been signed by the auctioneer and purchaser, the owner, with the knowledge and consent of the purchaser, afterwards added, "I hereby sanction this agreement, and approve of G. Lavender (the auctioneer)

(*t*) *Paice* v. *Walker*, L. R. 5 Ex. 173; 39 L. J. Ex. 109; and see *Hough* v. *Manzanos*, 4 Ex. D. 104.

(*u*) *Gadd* v. *Houghton*, 1 Ex. D. 357, C. A.

(*x*) *Parker* v. *Winlow*, 7 Ell. & Bl. 942; 27 L. J. Q. B. 49.

(*y*) *Lennard* v. *Robinson*, 5 Ell. & Bl. 126; 24 L. J. Q. B. 275.

(*z*) Best, C. J., *Norton* v. *Herron*, 1 C. & P. 648; Ry. & Mood. 231; *Tanner* v. *Christian*, 4 Ell. & Bl. 597; 24 L. J. Q. B. 91.

(*a*) *Downman* v. *Williams*, 7 Q. B. 103.

(*b*) *Oglesby* v. *Iglesias*, Ell. Bl. & Ell. 930; 27 L. J. Q. B. 356.

(*c*) *Gaby* v. *Driver*, 2 Y. & J. 565.

having signed the same, on my behalf," to which ratification he appended his own signature, it was held that the agreement and ratification might be considered as one transaction, and that it manifested an understanding by all parties that the owner, and not the auctioneer, was to be liable upon the contract (*d*). And, where goods were accepted by an agent under a bill of lading, which made them deliverable unto him "for the London Gas Company, or to his assignees, he or they paying freight for the said goods," and the defendant on the delivery of the goods, promised to pay the freight, it was held that, as the defendant appeared, upon the face of the bill of lading, to be merely the agent of the London Gas Company, and had received the goods in that character, and not on his own account, the promise must be taken to have been made by him in his character of agent for the company, to pay the freight on their account, and was not a promise to be personally responsible for it (*e*).

Whenever the agent contracts as agent, and signs his name, adding "as agent," or "by procuration," or signs the name of the principal, adding "by A. B., as agent," and the principal is named in the body of the contract, it will require extremely strong words to control the effect of this form of signature, and render the party so signing personally responsible upon the contract (*f*). Thus, where a charter-party of affreightment, not under seal, was expressed to be made between Jenkins of the one part and Barnes of the other part, and contained divers stipulations between Barnes and Jenkins, and was signed *Ralph Hutchinson* for T. A. Barnes, and Hutchinson had no authority to sign for Barnes, it was held that Hutchinson could not be sued upon the contract, as his name did not appear therein as a contracting party (*g*).

Contracts by agents on behalf of foreign principals.—When an English agent is contracting on behalf of a foreign principal, it will, in general, be presumed that the agent was intended to be responsible for the fulfilment of the contract (*h*). In such a case both the agent and the principal are liable upon the contract; but the presumption of liability on the part of the agent may be rebutted by the form and terms of the contract. Thus, where a written contract was expressed to be made between V., a foreigner resident abroad, and the plaintiff, and the contract was merely signed by the defendant for V., the foreign principal,

(*d*) *Spittle* v. *Lavender*, 5 Moore, 270.

(*e*) *Amos* v. *Temperley*, 8 M. & W. 805.

(*f*) *Deslandes* v. *Gregory*, 29 L. J. Q. B. 95; 30 *ib.* 36; *Green* v. *Kopke*, 18 C. B. 549; *Mahony* v. *Kekulé*, 14 C. B. 390.

(*g*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; 18 L. J. Q. B. 274; *Deslandes* v. *Gregory*, 2 El. & El 602; 30 L. J. Q. B. 36.

(*h*) *Wilson* v. *Zulueta*, 14 Q. B. 405; 19 L. J. Q. B 49; *Cooke* v. *Wilson*, 1 C. B. N. S. 164.

it was held that the defendant could not be sued upon the contract (*i*).

Undisclosed agencies.—Whenever an agent enters into an agreement or undertaking, and neglects to declare the agency, and to qualify his liability upon the face of the contract, he is personally responsible, and is not, in general, permitted to show, through the medium of oral evidence, that the other contracting party knew him to be merely an agent, and knew who his principal was, at the time he signed the contract. Such evidence is admitted, as we have already seen, in order to enable a creditor to get at the real principal, and to charge him with the burthen of the performance of the contract; but not for the purpose of *dis*charging the agent from an agreement or undertaking which is absolute and unqualified upon the face of it, and in which the agent has thought fit to represent himself as the really contracting party (*k*). But, if an agent contracting on behalf of his principal has contracted in writing so as to render himself personally responsible upon the written contract, oral evidence is now admissible to show that at the time the contract was entered into the plaintiff knew the defendant to be only an agent, and that it was expressly agreed that he should not incur any personal liability upon the contract, and that the drawing up the agreement so as to make the defendant personally liable was the result of a mistake, and was contrary to the intention of the parties to the contract (*l*). Although brokers contract as such on the face of their bought and sold notes, yet, if they do not name their principals, they are by the custom of some trades liable to be treated as principals, and sued as such (*m*).

All bills of exchange and promissory notes signed by an agent, without any qualification of his liability, are binding upon the agent; and he cannot discharge himself from liability merely by showing that, at the time he accepted or endorsed the bill, or made the note, he was known to be merely an agent, having himself no interest in, and deriving no benefit from, the transaction (*n*).

If an agent orders goods, or enters into dealings and transactions in his own name on behalf of an unknown or undisclosed

(*i*) *Mahony* v. *Kekulé*, 14 C. B. 390; 23 L. J. C. P. 54.

(*k*) *Higgins* v. *Senior*, 8 M. & W. 844; *Hanson* v. *Roberdeau*, Peake, 163; *Kendray* v. *Hodgson*, 5 Esp. 228; *De Gelder* v. *Savory*, 2 Keb. 812. So by the French law, "*Dans tous les engagements que le préposé contracte et san propre nom pour les affaires auxquelles il est préposé, il s'oblige en même temps son commettant comme débiteur accessoire.*"—Poth. (Obl.), No. 448; *Gray* v. *Gutteridge*, 1 M. & R. 618; *Franklyn* v. *Lamond*, 16 L. J. C. P. 221; 4 C. B. 664.

(*l*) *Wake* v. *Harrop*, *ante*, p. 63.

(*m*) *Humfrey* v. *Dale*, 7 Ell. & Bl. 278; El. Bl. & El. 1004; 27 L. J. Q. B. 390; *Fleet* v. *Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49. See *Southwell* v. *Bowditch*, 1 C. P. D. 374, where a distinction is drawn between the words "bought of you for my principals," and "sold for you to my principals."

(*n*) *Leadbitter* v. *Farrow*, 5 M. & S. 345; *Thomas* v. *Bishop*, 2 Str. 955; *Ex parte Buckley*, 14 M. & W. 469, overruling *Hall* v. *Smith*, 1 B. & C. 407; sect. 26 of Bills of Exchange Act in Appendix.

principal, he is, of course, himself personally liable in respect of such transactions, unless the party with whom he has contracted has discovered the principal, and elected to charge him in preference to the agent. "If an auctioneer sells commodities without saying on whose behalf he sells them, the purchaser is entitled to look to him personally for the completion of the contract" (o). And even where the name of the principal appears upon the face of the contract, if the contract shows that the auctioneer is dealing personally with the purchaser, the auctioneer will be personally bound by his contract (p). But, if the agent contracts in his representative character avowedly as agent, on behalf of a named or known principal, he is not personally responsible upon the contract, unless he has himself some special interest in the subject matter of the contract, as presently mentioned and described (q). Wherever an order is given by one person for another, and he informs the tradesman who that person is for whose use the goods are ordered, he thereby declares himself to be merely an agent; and there is no foundation for holding him liable unless the goods come to his use in some shape or another (r).

Notoriety of agency—Public officers.—If a person is placed in a situation rendering his character of agent notorious, he cannot be made personally liable in respect of his dealings and transactions in the usual course of his employment. Thus the surveyor of a turnpike road, in the employment of the commissioners for highways, is not personally liable to the labourers employed in the repair of the road for their wages; for the contract is, by implication of law, made with the commissioners (s). Neither is the solicitor under a bankruptcy responsible to a messenger nominated by him for the amount of such messenger's "bill of fees," inasmuch as the messenger must be taken to be aware that the solicitor is not a principal in the transaction (t). Neither can a witness who has been subpœnaed to give evidence in a cause conducted by an attorney maintain an action against the latter for his expenses of attendance, as it is notorious that the attorney is a mere agent, and the witness knows that he attends to give evidence not for him but for his principal (u). If, however, the agent himself has any interest in the subject-matter of the contract—if he acts for himself, as well as for third parties whom he professes to represent—he cannot escape from liability under a plea of agency. In such a case he is both principal and agent, and is responsible accordingly.

(o) *Hanson* v. *Roberdeau*, Peake, 163; *Franklyn* v. *Lamonde*, 4 C. B. 644.
(p) *Wolfe* v. *Horne*, 2 Q. B. D. 355.
(q) *Infra*, and see p. 62.
(r) *Owen* v. *Gooch*, 2 Esp. 568.
(s) *Pochin* v. *Pawley*, 1 W. Bl. 670.
(t) *Hartop* v. *Juckes*, 2 M. & S. 438; *Russell* v. *Reece*, 2 C. & K. 669; *Macgregor* v. *Deal & Dover, &c.*, 22 L. J. Q. B. 69.
(u) *Robins* v. *Bridge*, 3 M. & W. 118.

Masters of ships, being something more than mere agents, are personally responsible in respect of stores and necessaries furnished for the use of vessels under their command, and for repairs done by their orders, unless they expressly guard themselves from personal liability, and confine the credit to the owners of the vessel (*x*). A separate action cannot be maintained against the master and the owner of a ship for the same identical cause of action. The creditor has an election to sue either the one or the other; but he cannot, after he has sued the one to judgment, maintain another action against the other (*y*).

Pretended agencies.—When the agent contracts without authority from the principal on whose behalf he professes to act, the nature and extent of his liability will depend upon the nature and form of the contract. He cannot, as we have seen, be sued in any case upon the contract, if he has not contracted therein in his own name (*ante*, p. 65), although he may be liable to the plaintiff for warranting or representing himself to be an agent, and to have authority to make the contract, when he is not the agent and had no such authority (*z*): provided the misrepresentation was a misrepresentation of fact and not merely of law (*a*). A person who contracts in his own name on behalf of another, but who is really a principal, cannot shelter himself from responsibility by describing himself on the face of the contract as an agent, and providing that he shall not be personally responsible (*b*). Where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it, and a stranger cannot by a subsequent ratification relieve him from that liability (*c*). If the acceptor of a bill of exchange professes to accept per procuration as agent, he is responsible upon the bill, if he was himself the principal, and acted without the authority of the party on whose account he professed to act (*d*). But the burthen of proving that the party describing himself on the face of the contract as agent is in truth the principal falls upon the plaintiff seeking to falsify

(*x*) *Rich* v. *Coe*, 2 Cowp. 639.

(*y*) *Priestley* v. *Fernie*, 34 L. J. Ex. 173.

(*z*) *Collen* v. *Wright*, 8 Ell. & Bl. 647; 27 L. J. Q. B. 217; *Simons* v. *Patchett*, 7 E. & B. 568; 26 L. J. Q. B. 195; *Pow* v. *Davis*, 1 B. & S. 220; 30 L. J. Q. B. 257; *Hughes* v. *Græme*, 34 L. J. Q. B. 335; *Cherry* v. *Bank of Australasia*, L. R. 3 P. C. 24; 38 L. J. P. C. 49; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; 40 L. J. Q. B. 149; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *McCollin* v. *Gilpin*, 5 Q. B. D. 390; 6 Q. B. D. 516; *Beattie* v. *Ebury*, L. R. 7 H. L. 102; *Dickson* v. *Reuter's Telegraph Co.*, 3 C. P. D. 1; *Chapleo* v. *Brunswick Building Society*, 6 Q. B. D. 696.

(*a*) *Rashdall* v. *Ford*, L. R. 2 Eq. 750; 35 L. J. Ch. 769; *Beattie* v. *Lord Ebury*, L. R. 7 Ch. 777; 41 L. J. Ch. 804.

(*b*) *Schmalz* v. *Avery*, 20 L. J. Q. B. 229.

(*c*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(*d*) *Owen* v. *Van Uster*, 10 C. B. 324.

the contract and to show that the defendant assumed a false position (e).

"One person may," observes Erle, J., "assert he has authority to make a contract on behalf of another, and *bonâ fide* believe it, and yet it may be deceit if he makes the positive assertion without disclosing the grounds on which he erroneously, as it turns out, believes it" (f). Where, therefore, the defendant represented himself to be the agent of one Gardner, and as such authorized to let an estate to the plaintiff, and the defendant had no authority to let the property, although he believed that he had, and in consequence of that mistake the plaintiff was induced to lay out money upon the estate, relying on the representation, it was held that the defendant was liable for all the expenses incurred by the plaintiff on the strength of the representation (g). "I am of opinion," observes Willes, J., "that a person who induces others to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages he sustains by reason of the assertion of the authority being untrue. This is not the case of a bare misstatement to a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act, but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains. If one of the two in such cases is to suffer, it ought not to be the person who has been guilty of no error, but he who, by an untrue assertion, believed and acted upon, as he intended it should be, and touching a subject within his peculiar knowledge, and as to which he gave the other party no opportunity of judging for himself, has brought about the damage. The obligation arising in such a case is well expressed by saying that the person professing to contract as agent for another impliedly undertakes with the person who enters into such a contract upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist" (h). Thus where a person lent money to a building society, and received a receipt signed by two directors, but the society had no power to borrow money, it was held that, by signing the receipt, the directors in effect represented that they had authority to make a valid contract of loan on

(e) *Carr* v. *Jackson*, 21 L. J. Ex. 137; 7 Exch. 382.

(f) *Jenkins* v. *Hutchinson*, 13 Q. B. 748; *Randell* v. *Trimen*, 18 C. B. 786; 25 Law J. C. P. 307; *Richardson* v. *Dunn*, 8 C. B. N. S. 655; 30 Law J. C. P. 44.

(g) *Collen* v. *Wright*, 8 Ell. & Bl. 647; 26 L. J. Q. B. 147; 27 *ib.* 215.

(h) *Collen* v. *Wright*, *supra*; *Pow* v. *Davis*, 4 B & S. 220; 30 L. J. Q. B. 257.

behalf of the society, and that they were therefore personally liable to repay the money (*i*).

If the authority is of a public nature, or the grounds of it are known to the other contracting party, and the agent does no more than express his own opinion and belief as to the nature and extent of the authority vested in him, and manifests an intention merely to bind the principal if he has power so to do, and guards himself against any positive representation of authority, he will not then be responsible if it should turn out that he had not the power he was supposed to possess (*k*).

A mistake made by an agent in describing the quantity of goods he has bought for his principal, or the time of their delivery, or the price to be paid for them, may render such agent liable to his principal for negligence or for a breach of duty (*l*), but does not render him liable to an action for deceit (*m*); it is otherwise, however, if he knowingly makes a false representation with intent to deceive his employer (*n*).

Contracts by the agents of irresponsible principals—Government agents.—If the other contracting party chooses to give credit to a known irresponsible principal, acting through the medium of an agent, taking his chance of payment from such principal, the agent will not, in such a case, be liable upon the contract (*o*). If the agent acts in a public employment, and the extent of his authority is as much known to the party contracting with the agent as to the agent himself, and it is manifest that the former intended to rely on the subsequent ratification of the contract by the principal, and was not led into the contract by any misstatement or misrepresentation on the part of the agent respecting his authority in the matter, the agent will not incur any personal liability. Thus the governor of a fort, or of a colony, is not personally answerable for stores ordered by him for the use of government; neither is a military commissary, nor the captain of a troop, liable for forage supplied to the army or to the troop, nor for provisions furnished to the men; nor is the first Lord of the Treasury personally answerable for the expenses incurred by a person employed in raising a regiment for the service of government (*p*); nor is the Secretary of War liable to a retired clerk of the War-office for his retired allowance, although such allowance

(*i*) *Richardson* v. *Williamson*, L. R. 6 Q. B. 276. See *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. Ca. 24; *Leather* v. *Simpson*, L. R. 11 Eq. Ca. 398.

(*k*) *Macgregor* v. *Deal and Dover Ry. Co.*, 22 L. J. Q. B. 69.

(*l*) See, *per* Blackburn, J., *Ireland* v. *Livingston*, L. R. 5 Engl. and Ir. App. 395.

(*m*) *Thorn* v. *Bigland*, 8 Exch. 729.

(*n*) *Pewtriss* v. *Austen*, 6 Taunt. 522.

(*o*) *Lewis* v. *Nicholson*, 18 Q. B. 503; 21 L. J. Q. B. 311; *Wake* v. *Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 *ib.* 451.

(*p*) *Rice* v. *Chute*, 1 East, 579; *Myrtle* v. *Beaver*, *id.* 135; *Macbeath* v. *Haldimand*, 1 T. R. 180.

was included in the yearly estimates drawn for by such secretary, and received by him as applicable to such specific allowance, there being no duty from which the law will imply a promise from the secretary, who is the agent and officer of the crown, and responsible only to the crown for the due execution of the trust committed to him (q). In all these cases, the nature and extent of the agent's authority are as much known to the party with whom he contracts as to the agent himself; and it is obvious that in these public transactions the individual credit of the agent is not intended to be pledged, but that the parties who contract with him rely on the honour and good faith of the irresponsible principal. The agent of a foreign government cannot be sued upon their bonds (r).

The clerk of the County Court, giving orders for the fitting up of a building for the holding of the sittings of the court, is not a public officer acting in a public employment, so as to be exonerated from liability in respect of the order so given (s).

Money received by agents for the principal.—If money be paid to a known agent for the use of his principal, an action for money had and received cannot be sustained against the agent if it appears that the principal has the least colour of right to the money; for the courts will not try the right of the principal to the money in an action against the agent (t). The agent having received the money on behalf of the principal, and for his use, is accountable to the latter for it. The maxim, *respondeat superior*, therefore, applies; and the agent, whether he has paid over the money, or whether he has not, is answerable to the principal alone (u). But, if the payment to the agent is void *ab initio*, so that the money never was received by him for the use of his principal, and he is consequently not accountable to the latter for it, he is bound to refund the amount, if he has not actually paid it over, or settled for it in account with his principal, at the time he receives notice of the mistake. Thus, if money, through a mistake of fact, is paid to an agent, and placed by him to the account of his principal, but not paid over, an action lies against him for the recovery of the money; and the mere passing such money in account, making rests without any new credit given, fresh bills accepted, or further sum advanced to the principal in consequence of it, is not equivalent to a payment of it over (x).

(q) *Gidley* v. *Lord Palmerston*, 3 B. & B. 275; 7 Moore, 91. See also *Palmer* v. *Hutchinson*, 6 Ap. Cas. 619.

(r) *Twycross* v. *Dreyfus*, 5 Ch. D. 605, C. A.

(s) *Autey* v. *Hutchinson*, 17 L. J. C. P. 304.

(t) *Sadler* v. *Evans*, 4 Burr. 1985; *Greenward* v. *Hurd*, 4 T. R. 553.

(u) *Dixon* v. *Hamond*, 2 B. & Ald. 313; *Hardman* v. *Willcock*, 9 Bing. 382, n.; *Stephens* v. *Badcock*, 3 B. & Ad. 354; *White* v. *Bartlett*, 9 Bing. 378; 2 M. & Sc. 526; *Goodall* v. *Lowndes*, 6 Q. B. 464.

(x) *Buller* v. *Harrison*, 2 Cowp. 565; *Bishop* v. *Eagle*, 10 Mod. 23; *Cox* v. *Prentice*, 3 M. & S. 344; *Horsfall* v.

But, if he has paid it over or settled for it in account with his principal, he cannot be compelled to refund it (*y*). If, however, he misleads the plaintiff by giving him to understand that he has not paid over the money, and thereby induces the plaintiff to sue him for its recovery, he is then precluded from insisting on the defence of payment over (*z*).

Money wrongfully and illegally received by agents.—The doctrine, that the receipt of the agent is the receipt of the principal, does not extend to the case of a wrong-doer, so that, if an agent gets money into his hands by his own fraudulent or illegal act, he cannot discharge himself from liability by paying it over to his principal (*a*).

Receipt of money by agents to be paid over to a stranger.—The mere circumstance of money having been paid by a principal to his agent, with directions to pay it to a third person, imposes, as we have already seen (*b*), no liability upon the agent to such third person, unless there is an express or implied assent on the part of the agent to pay the money according to the directions he has received; and the mere receipt of the money by the agent is no evidence of an implied assent to apply it to the purposes for which it was professedly remitted to him. He holds the money for the use of the remitter: the privity of contract is between him and his principal, and not between the agent and such third party, until by some act done, or by some engagement entered into with the person who is the object of the remittance, the agent has consented to appropriate the money to his use (*c*.)

Liabilities of agents on contracts under seal.—The liability in the case of deeds is always confined to the person who has contracted therein in his own name, and who has sealed and delivered the deed, and does not extend to the person on whose behalf, and for whose benefit, the contract is expressed to be made. When, therefore, an individual acting in a private capacity, and not on behalf of the government, covenants in his own name, under his own hand and seal, for the act of another, he is personally bound by his covenant, although he describes himself in the deed as covenanting "for and on the part and behalf" of such other person; for "a man may bind himself for the act of another, and to pay out of a fund not his own, and will be liable in either

Handley, 2 Moore, 5; 8 Taunt. 136; *Holland* v. *Russell*, 30 L. J. Q. B. 312; *Newall* v *Tomlinson*, L. R. 6 C. P. 405.

(*y*) *Holland* v. *Russell*, 4 B. & S. 14; 32 L. J. Q. B. 297; *Shand* v. *Grant*, 15 C. B. N. S. 324.

(*z*) *Edwards* v. *Hodding*, 5 Taunt. 816.

(*a*) *Townson* v. *Wilson*, 1 Campb. 397; *Anon. ib.* 398, n.; *Clark* v. *Johnson*, 3 Bing. 426; *Miller* v. *Aris*, 1 Selw. N. P. 90, n.; Addison on Torts, 5th ed. by Cave, p. 88.

(*b*) *Ante*, p. 27.

(*c*) *Moore* v. *Bushell*, 27 L. J. Ex. 3; *Hill* v. *Royds*, L. R. 8 Eq. 290; 38 L. J. Ch. 538; *New Zealand Co.* v. *Watson*, 7 Q. B. D. 374.

case" (*d*). A proviso totally inconsistent with any personal liability, where no fund is pointed out or provided for the payment of the money, has been held to be repugnant and void (*e*); but a proviso limiting but not destroying the liability is valid (*f*); it has also been held that an agent may contract for a principal on the express terms that he is himself to incur no personal liability, whether the principal is, or is not, bound by the contract (*g*).

Exemption of public officers.—When upon the face of a contract under seal it appears that the covenantor is an officer acting in a public capacity in discharge of his duty to the crown or the country, he is not personally liable for the fulfilment of the contract, unless he gives his own undertaking, and it plainly appears to have been the intention of the contracting parties that he should himself be responsible for the performance of the act covenanted to be done; for it would be detrimental to the public service to hold that governors and commanders-in-chief were personally responsible upon contracts entered into by them in the execution of their duty, unless the intention of the contracting parties that they should be liable was plainly manifested upon the face of the contract (*h*).

Execution of deeds by agents not rendering them personally liable.—There is a wide distinction between entering into a deed for and on behalf of another, and merely executing it in his behalf. If an agent is duly authorised by power of attorney under seal to enter into and execute a deed for his principal, and the principal is made to contract in his own name and the agent merely executes the deed for him, the principal, and not the agent, is bound by the execution of the deed. In such a case it is usual to denote by some form of words that the deed is executed by an agent on behalf of the principal; the agent either signs his own name, adding "for B." (the principal), or he signs the name of B. adding "by A., his attorney." When the principal himself is made to covenant, and the agent appears merely as the executing party, if the agent has not an authority under seal to warrant his acts, there is no binding contract at all; the principal cannot be bound, as he has not legally sanctioned the contract, and the agent cannot be made liable upon it, as he has not contracted in his own name.

Of the rights of partners upon contracts with third parties.—If a contract is entered into with one partner in his individual

(*d*) *Appleton* v. *Binks*, 5 East, 148; *Talbot* v. *Godbolt*, Yelv. 137; 5 Bacon's Abr. 372; *Hancock* v. *Hodgson*, 12 Moore, 504.

(*e*) *Furnivall* v. *Coombes*, 5 M. & G. 736; 6 Sc. N. R. 536.

(*f*) *Williams* v. *Hathaway*, 6 Ch. D. 544.

(*g*) *Wake* v. *Harrop*, 6 H. & N. 678; 30 L. J. Ex. 273; 1 H. & C. 202.; 31 L. J. Ex. 451.

(*h*) *Wake* v. *Harrop*, *supra*; *Unwin* v. *Wolseley*, 1 T. R. 674; *Allen* v. *Waldegrave*, 2 Moore, 628.

capacity, and apparently on his own account; but in reality on behalf of the firm of which he is a member, and the joint interest and joint consideration are not disclosed upon the face of the writing, the partner so contracting stands in the position of an agent dealing on behalf of an undisclosed principal; and either the partner with whom the contract is so made, or the firm, as the parties really interested in it, may enforce it (*i*), the defendant being entitled, in the latter case, to set up against the firm any defence that he would have had to an action brought by the one partner alone (*k*). Thus, if a written contract for the sale of goods, the joint property of several partners, be entered into by one of them in his own name only, all the partners may enforce it, although the purchaser had at the time no knowledge that there were other persons interested in the transaction besides the one he had contracted with (*l*).

Implied contracts and promises with firms in partnership.—If a service or benefit, in respect of which the law implies a promise, moves from a firm in partnership, the promise is a joint promise in favour of all the partners (*m*). If, on the other hand, it moves from one partner separately and individually on his own account, it is a private contract in which the partnership has no concern (*n*). Whenever the services have been rendered by the one partner on the partnership account, and the remuneration for such services belongs to the joint purse, all the partners are jointly interested in the consideration (*o*). When the money of the partnership has been lent by the one partner alone, there is an implied promise of repayment in favour of all the partners (*p*); but, if they permit one partner to deal with the partnership property in his own name, as the sole owner of it, or as the sole party interested, they cannot stand in a better situation than the one partner who has been permitted so to act (*q*). And, when one party lends money in his own name, and nominally on his own account, but really on account of, and as the loan of, the firm, the firm, if it sues for the money, must show clearly and distinctly that the advance was made on its account, and as a loan from the partnership, although the fact might at the time be unknown to the borrower; for, as we have before seen, "if B. lends money to A.,

(*i*) *Alexander* v. *Barker*, 2 Tyr. 147; 2 Cr. & J. 133.

(*k*) *Stracey* v. *Decy*, 7 T. R. 361, n.; *Gordon* v. *Ellis*, 13 L. J. C. P. 179; 2 C. B. 821.

(*l*) *Skinner* v. *Stocks*, 4 B. & Ald. 437.

(*m*) *Bond* v. *Pittard*, 3 M & W. 357; *Lambert's case*, Godb. 244.

(*n*) *Brandon* v. *Hubbard*, 4 *Moore*, 367.

(*o*) *Arden* v. *Tucker*, 4 B & Ad. 815.

(*p*) *Alexander* v. *Barker*, 2 Cr. & J. 139.

(*q*) *Lucas* v. *De la Cour*, 1 M. & S. 249; *Gordon* v. *Ellis*, 2 C. B. 821; 13 L. J. C. P. 182; *Robson* v. *Drummond*, 2 B. & Ad. 303.

and A. makes a further loan of it to C., B. would have no right of action against C. to recover it back" (r).

Trust services by partners.—If one of the partners is a trustee, and work is done by the firm in the execution of the trust, the firm cannot charge for their trouble and services (s).

Contracts with the trustees or directors of co-partnerships.—In order to obviate the inconvenience arising from deaths and changes in a firm, when a large number of persons are associated together in partnership, recourse has been had to trustees, who have been appointed to conduct the business of co-partnerships, and enter into contracts for the general benefit of the concern (t). When a number of persons are associated together in partnership in this manner, the trustees have the general conduct and management of the co-partnership, and form the acting partners of the concern, whilst the others contribute merely their capital, and receive accruing profits in proportion to their interests, and stand, consequently, in the position of dormant partners. All simple contracts entered into with the co-partnership by name, or with one or more of the trustees are, in contemplation of law, entered into with all of them jointly, as the acting partners performing the ostensible acts of the co-partnership (u). They are also, as the acting partners, jointly interested in all implied contracts arising out of partnership transactions (x).

Liabilities of partners upon simple contracts.—Each member of a complete partnership is liable for himself, and as agent for the rest binds them, upon all contracts made in the ordinary course of the business of the co-partnership (y). Where partners simply agree to carry on a partnership of which the term is not fixed, one of those partners has no authority to take a lease so as to bind the others (z). But every one of the partners in a general trading partnership is, in contemplation of law, in the absence of any known controlling stipulation between them, clothed with an implied authority to enter into simple contracts on behalf of the firm in furtherance of the ordinary business of the co-partnership, and to use the trading name of the firm in all such contracts and in all dealings and transactions in respect of which partners in such trade usually have authority to bind one another; and each of the partners is individually liable for the performance of such contracts in the same manner as if they had been entered into

(r) *Sims* v. *Bond*, 5 B. & Ad. 389.
(s) *Mathison* v. *Clark*, 18 Jur. 1020.
(t) *Metcalf* v. *Bruin*, 12 East, 404–406; *Clay* v. *Southern*, 21 L. J. Ex. 202; 7 Exch. 717.
(u) *Phelps* v. *Lyle*, 10 Ad. & E. 113.
(x) *Lefevre* v. *Boyle*, 3 B. & Ad. 880; *Megginson* v. *Harper*, 2 C. & M. 322.
(y) Ld. Wensleydale, *Ernest* v. *Nicholls*, 6 H. L. C. 418; *Cox* v. *Hickman*, 9 C. B. N. S. 99; 8 H. L. C. 268; 30 L. J. C. P. 125; *Kilshaw* v. *Jukes*, 3 B. & S. 847; 32 L. J. Q. B. 220.
(z) *Sharp* v. *Milligan*, 22 Beav. 610.

personally by himself (*a*). But this implied general authority is confined to general partnerships in trade, where the partners are jointly interested in the capital stock of the business, as well as in the profits accruing therefrom, and does not extend to partnerships in particular transactions, or to limited partnerships in profits, where the partner has no interest in the capital stock. Thus, where an author and publisher agree to publish a work for their mutual profit, upon the understanding that the author is to write the book, and the publisher to print and publish it at his own expense, there is no implied authority from the author to the publisher to contract for the supply of paper, or for the printing, or for any other matter necessary for the publication of the work, so as to render the author responsible for the price of the paper, or for printing, or advertisements, or anything else ordered by the publisher for the purposes of the publication (*b*).

Where several coach-proprietors agree to undertake the carriage of passengers and parcels on a certain line of road for their mutual profit, and divide the road into districts, and each proprietor horses and conveys the coach over his own district, finding his own horses, harness, and servants, stables, hay, straw, and horse-keepers for the execution of his share of the undertaking, one has no authority to bind the others by contracts for the employment of servants, or for the purchase of horses, hay, straw, or any other thing necessary for the carriage of the passengers (*c*). But they are each clothed with an implied authority to enter into all customary and reasonable contracts with the passengers for their conveyance, and all, consequently, may be bound thereby (*d*); and, if one of them, whose business it is to hire coaches, contracts with a coach-maker for the supply of coaches to run throughout along the whole line of road, and not merely for his particular district, this is a contract with the whole partnership, and all are jointly responsible upon it (*e*).

A partnership contract for value given to the partnership, being a mercantile partnership, is several as well as joint (*f*).

Who may be made liable as partners.—Where a person is sought to be made liable on the ground of his being a partner, the true test is whether or not he has constituted the other alleged partner his agent in respect of the partnership business to carry it on on his behalf. A participation in the profits, though cogent, is not conclusive evidence of a partnership (*g*). And it is now

(*a*) Poth. Obl. No. 83.

(*b*) *Wilson* v. *Whitehead*, 10 M. & W. 503.

(*c*) *Barton* v. *Hanson*, 2 Taunt. 49.

(*d*) *Helsby* v. *Mears*, 8 D. & R. 289.

(*e*) *Arthur* v. *Dale*, Collyer, Part. 330.

(*f*) *Beresford* v. *Browning*, L. R. 20 Eq. 564.

(*g*) *Cox* v. *Hickman*, 8 H. L. C. 268; 30 L. J. C. P. 125; *Kilshaw* v. *Jukes*, 3 B. & S. 847; 32 L. J. Q. B. 217; *Bullen* v. *Sharp*, L. R. 1 C. P. 86; 35

established, that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law, but of fact, be inferred; yet, that whether that relation does or does not exist, must depend on the real intention and contract of the parties (*h*). Thus, an assignment to trustees for the benefit of creditors, upon trust to divide the profits of the business amongst the creditors in reduction of their debts, does not render the creditors who execute the deed and participate in the profits responsible to third parties as partners (*i*). "The law as to partnership," says Lord Wensleydale, "is a branch of the law of principal and agent. A partner embraces both characters; and, where a man orders another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, he is the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts. This is the true principle of partnership liability" (*k*). A person who merely lends money to a firm in partnership to be employed in the business, or who receives interest for money advanced, is not a partner or joint adventurer in the business, as the money is payable at all events, and the right to receive it does not depend upon the contingencies and fluctuations of the trade (*l*). If a partner withdraws from the firm, leaving a certain amount of capital in the concern, for which he is to receive interest and a terminable annuity, payable at all events, this arrangement will not amount to a perpetuation and continuation of the preceding partnership. By the 28 & 29 Vict. c. 86, s. 1, the advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or persons carrying on such trade or undertaking, or render him responsible as such. By sect. 2, no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, or give him the rights of a partner. By sect. 3, no person being the widow or child of the deceased partner of a trader, and receiving by way of

L. J. C. P. 105; *English and Irish Church and University Assurance Society, In re*, 1 H. & M. 85.

(*h*) *Mollwo, March, and Co.* v. *The Court of Wards*, L. R. 4 P. C. 419; *Holme* v. *Hammond*, L. R. 7 Ex. 218; 41 L. J. Ex. 157; *Pooley* v. *Driver*, 5 Ch. D. 560; *Ex parte Tenant*, 6 Ch. D. 303.

(*i*) *Cox* v. *Hickman*, 9 C. B. N. S. 47; 8 H. L. C. 268; 30 L. J. C. P. 125.

(*k*) *Cox* v. *Hickman*, *supra*.

(*l*) *Elgie* v. *Webster*, 5 M. & W. 518.

annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to any liabilities incurred by such trader. By sect. 4, no person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of, or be subject to the liabilities of, the person carrying on such business. By sect. 5, in the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than 20*s*. in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interests payable in respect of such loan, nor shall any such vendor of a good-will as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the said trader for valuable consideration, in money or money's worth, have been satisfied. By sect. 6, in the construction of the Act, the word "person" is to include a partnership firm, a joint-stock company, and a corporation.

The above statute was passed to give protection against outside creditors to persons lending money to others in business (*m*). In order to bring a case within the statute, there must be a contract in writing, signed (*n*), and the document must show on the face of it that the transaction is a loan, and parol testimony to vary it is inadmissible (*o*). The whole intent and scope of the document must be looked to. The mere statement that the transaction is a loan, and the party is not a partner, will not prevent him from being a partner (*p*), nor will the mention of the word partnership by itself constitute a partnership, though it may be strong evidence of it (*q*). The Act does not apply to any contract unless the loan would, independently of the Act, have created the relation of debtor and creditor as distinguished from the relation of partners (*r*). The effect of s. 5 is to prevent the lender, with a share of profits, from proving in bankruptcy in competition with any of the creditors, even those whose debts are not connected with the business (*s*).

Inchoate and incomplete partnerships.—If several persons agree to unite together in partnership, and to raise a joint stock,

(*m*) See *per* Ld. Cairns in *Syers* v. *Syers*, 1 Ap. Cas. 174, at p. 182.

(*n*) *Pooley* v. *Driver*, 5 Ch. D. 458.

(*o*) See *per* Ld. Chelmsford, in *Syers* v. *Syers*, *supra*.

(*p*) *Ex parte Delhasse*, 7 Ch. D. 511.

(*q*) *Syers* v. *Syers*, *supra*.

(*r*) *Pooley* v. *Driver*, 5 Ch. D. 458.

(*s*) *Ex parte Taylor*, 12 Ch. D. 366.

and one borrows money, and another procures goods, to make up his share of the joint contribution, the one is not liable for the debt contracted by the other, as the partnership is not fully formed, and the partner is not acting in discharge of the ordinary functions of the co-partnership, but on his own private account (*t*). But, as soon as the partnership is in actual operation, and has begun business on the joint account, all those of the intended partners who assent to the commencement of the trading operations for their common benefit, or take an active part in promoting them, become present and complete partners in the undertaking, and impliedly accord to each other all such powers and authorities as are usual and reasonably necessary to enable them to discharge the functions of the co-partnership and carry the common object into effect.

Restrictions upon the apparent general authority of one partner to bind another, made by agreement amongst the partners, are operative only as between the partners themselves, and do not limit the partnership authority as to third persons who acquire rights by its exercise, unless the limitation of authority and liability is established and made known to parties dealing with the firm in the mode presently pointed out. If goods are supplied to A. and B. (who are partners) after notice by A. that he will not be answerable for any goods subsequently sent, it is incumbent on the plaintiff, in an action for the amount of such goods, to prove some act of adoption on the part of A. or that he has derived benefit from the goods (*u*).

Dealings by one partner in fraud of the co-partnership.—Every one of the partners is responsible for things done within the scope of their implied authority, although they be done in fraud of the partnership, unless the plaintiff who seeks to charge the co-partnership upon the fraudulent dealing of the single partner was himself a party, or in any way privy, to the fraud. If a simple contract concerning the partnership affairs and business is entered into by one of several partners in the trading name of the firm, or on behalf of the firm, or in his own name without mention of the co-partnership, all the partners are individually liable upon the contract, whether their names do or do not appear upon the face of the written instrument. They stand in the same position as an undisclosed principal who has entered into a simple contract in writing in the name of an agent (*x*). But this liability

(*t*) *Saville* v. *Robertson*, 4 T. R. 725; *Smith* v. *Craven*, 1 Cr. & J. 500; *Greenslade* v. *Dower*, 7 B. & C. 638; *Heap* v. *Dobson*, 15 C. B. N. S. 460.

(*u*) *Willis* v. *Dyson*, 1 Stark. 164.

(*x*) *Ante*, p. 45; *Trueman* v. *Loder*, 11 Ad. & E. 594; 2 Smith's L. C. 212; *Beckham* v. *Drake*, 9 M. & W 97; *Drake* v. *Beckham*, 11 *ib.* 315.

is confined to contracts made in the execution of the ordinary business of the co-partnership, as one partner is not liable upon the private and particular contracts and engagements of another partner made by him for his own individual benefit alone, and known, or which ought to have been known, by the plaintiff at the time not to be a partnership transaction (*y*). But a bill accepted in the name of a firm in the hands of a *bonâ fide* holder is valid against the firm, although the partner who accepted had no authority to do so, and his doing so was fraudulent (*z*).

In an action by an indorsee against members of a firm on a bill accepted in the name of the firm, upon its being proved that the acceptance was by one of the partners in fraud of the partnership and contrary to the partnership articles, the onus is cast on the holder of the bill, of showing that he gave value for it (*a*).

Transactions out of the ordinary course of business.—If the trading name of the firm, or an adopted or an acquired name, is used in dealings and transactions out of the ordinary scope and business of the co-partnership, such a user of the name will not bind the other partners, unless they have expressly assented thereto. In the case of professional partnerships, for example, where it is not usual or necessary for the purpose of carrying on the trading business of the firm, that bills or notes should be made, accepted or negotiated, one partner has no implied authority to pledge the name and credit of the co-partnership upon bills and notes (*b*). One joint tenant of a farm "has no power to bind the others by drawing or accepting bills, because it is not necessary or usual for the purpose of carrying on the farming business that bills should be drawn or accepted" (*c*). Nor can one of two partners bind the other by consenting to a reference or to an order for judgment in an action against himself and his co-partner (*d*). There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name (*e*).

Bills and notes in the name of the firm, given by one of the partners to secure his own private debt, cannot be enforced against the partnership by the party taking the security (*f*) unless he can show that the partner from whom he took it had the authority of his co-partners to pay his own private debt with the

(*y*) *Darlington Joint Stock District Banking Co., ex parte in re Riches*, 34 L. J. Bank. 10.

(*z*) *Wiseman* v. *Easton*, 8 L. T. N. S. 637.

(*a*) *Hogg* v. *Skeen*, 18 C. B. N. S. 426; 34 L. J. C. P. 153.

(*b*) *Hedley* v. *Bainbridge*, 3 Q. B. 316.

(*c*) Littledale, J., 10 B. & C. 138, 139; Holroyd, J., 7 B. & C. 639.

(*d*) *Hambidge* v. *De La Crouce*, 3 C. B. 745.

(*e*) *The Alliance Bank* v. *Kearsley*, L. R. 6 C. P. 433; 40 L. J. C. P. 249.

(*f*) *Shirreff* v. *Wilks*, 1 East, 51; *Jones* v. *Yates*, 9 B. & C. 532; *Ridley* v. *Taylor*, 13 East, 182; *May* v. *Chapman*, 16 M. & W. 355; see sect. 23 of Bills of Exchange Act, 1882, in Appendix.

acceptance of the firm (*g*). But, if the bill passes into the hands of a *bonâ fide* holder, the latter may enforce payment from the firm (if it be a trading firm) without giving any such evidence (*h*).

Representations and acknowledgments by partners touching the partnership business and dealings, made in the ordinary course of business, will bind all the members of the firm as between themselves and third parties who have acted upon the faith of such representations and statements (*i*).

Liabilities of dormant and secret partners.—Every person who secretly connects himself with a firm in partnership, furnishing capital, labour, and skill, and secretly participating in the profits of the business, stands in the position of an undisclosed principal (*ante*, pp. 45, 46) who has contracted in the name of an agent, and is liable in common with the acting and ostensible partners for the performance of the contracts, and the satisfaction of the debts and liabilities of the co-partnership, except in the case of bills and notes not drawn or made in the name of the firm. The secret partner may be sued, although the contract is made in the name of one only of the partners, and the firm has not previously recognised any contracts made in his name alone as partnership contracts (*k*); but the existence of an actual partnership must be proved so as to confer on the one an authority to bind the other (*l*). The mere concurrence of creditors in an arrangement, under which trustees carry on the business of their debtor for their benefit, and for the purpose of dividing the profits of the trade amongst them, does not make them partners (*m*).

Private agreements between parties exempting dormant partners from liability.—The liability of persons who have participated as principals in the joint speculations and contingent profits of a partnership or joint adventure cannot, as we have seen (*ante*, p. 79), in any way be controlled or affected by the secret contracts of the joint adventurers *inter se*. If, therefore, the joint adventurers expressly agree not to be partners *inter se*, such an agreement cannot in any way affect their position as regards the public. If several partners or joint adventurers in a particular trade or business agree that the trade shall be carried on by one or more of them

(*g*) *Leverson* v. *Lane*, 13 C. B. N. S. 278; 32 L. J. C. P. 10. As to whether a reasonable belief by the creditor that the partner had such authority is sufficient, see *Kendal* v. *Wood*, L. R. 6 Ex. 243, 248; 39 L. J. Ex. 167. It would seem on principle that such belief is not sufficient unless it has been induced by the acts of the other partners. See also *Hogarth* v. *Latham*, 3 Q. B. D. 643.

(*h*) *Wiseman* v. *Easton*, 8 L. T. R. N. S. 637; see *per* Bramwell, L. J., in *Hogarth* v. *Latham*, *supra*, at p. 648; *Garland* v. *Jacomb*, L. R. 8 Ex. at p. 219.

(*i*) *Rapp* v. *Latham*, 2 B. & Ald. 801.

(*k*) *Beckham* v. *Drake*, 9 M. & W. 97; *Drake* v. *Beckham*, 11 *ib.* 315.

(*l*) *Kilshaw* v. *Jukes*, 3 B. & S. 847; 32 L. J. Q. B. 220.

(*m*) *Cox* v. *Hickman*, 9 C. B. N. S. 47; 30 L. J. C. P. 125; 8 H. L. C. 268; *Re Stanton Iron Co.*, 21 Beav. 172; 25 L. J. Ch. 142.

in their own names as the ostensible and acting partners, and that certain secret partners who contribute capital, skill, or labour to the joint stock of the partnership, shall not be liable for losses beyond a certain amount, the operation of the agreement is confined to those who are parties to it, and cannot affect the liability of such secret partners as regards the public and third persons, unless the limitation of liability is established and made notorious, in the mode presently pointed out (*post*, p. 104). And it matters not whether the party participates in and receives, or bargains for, a share in the accruing profits for his own benefit, or as a trustee or executor for others. Equally indifferent is it whether his share be large or small (*n*).

Liabilities of nominal partners.—Persons may become clothed with the legal liabilities and responsibilities of partners as regards the public and third parties, by holding themselves out to the world as partners as well as by contracting the legal relationship of partners *inter se.* When the question is not between the parties themselves as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house as to who shall be deemed liable in regard to those funds, the sense or understanding of the parties themselves *inter se* that they shall not be partners will be of no avail, and will not affect the existence of the partnership so far as regards the public at large. "If a man will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them" (*o*).

Persons suffering themselves to be held out to the world as partners or members of a particular firm, by permitting their names to be used in the business, or exhibited over a shop-window, or to be written in invoices or prospectuses, or to be published in advertisements as the names of members of the firm, are chargeable as partners, although they are not in point of fact partners, and have no share or interest in the business (*p*). But it must appear that the partnership was actually formed and in operation, and was not merely a projected joint adventure (*q*). If a person holds himself out to the world as a partner with another in a particular line of business only, he does not thereby render himself liable as a partner in other transactions not within the course of that busi-

(*n*) *Wightman* v. *Townroe*, 1 M. & S. 412.

(*o*) Eyre, C. J., *Waugh* v. *Carver*, 2 H. Bl. 246; 1 Smith, 502, 503.

(*p*) *Guidon* v. *Robson*, 2 Campb. 304.

(*q*) *Bourne* v. *Freeth*, 9 B. & C. 640, 641.

ness (*r*). And, if a plaintiff has contracted with a firm in partnership, knowing at the time that the defendant, whose name appeared in the name of the firm as an ostensible partner, was not in fact a partner, and had no share or interest in the partnership, he cannot afterwards make the defendant responsible upon the contract which he entered into with notice of that fact (*s*). If a man's name is used without his knowledge and consent, he cannot be made responsible as a partner upon the strength of such false representation (*t*). A man may, however, be fixed with the liabilities and responsibilities of a partner through the medium of his own express admissions or representations (*u*); but a plaintiff seeking to found an action upon them must prove that he knew of, and acted upon, such statements and representations, and dealt with, and credited, the firm, under the belief that they were true (*x*). No mistaken supposition of a party as to his being a partner will make him liable as such, unless it were communicated to the plaintiff so as to mislead him (*y*).

Liabilities of incoming and retiring partners.—An incoming partner cannot be made responsible for the non-performance of contracts entered into by the firm before he became an actual or reputed member of it. He cannot, for instance, be made responsible upon bills or notes accepted or made by his co-partners before he became a member of the firm; but, if a bill be accepted on account of a debt which was incurred partly before, and partly after, such partner joined the firm, he is liable for so much of the debt for which the bill was accepted as accrued subsequently to his accession to the partnership (*z*). An incoming partner cannot be charged with the payment of the price of goods sold to the copartnership before he became a member of it, although they may have been delivered subsequently thereto (*a*). "When a banking firm," observes Parke, B., "makes payments professedly on account of a customer without his authority, and those payments are entered to the debit of the customer in the books of the firm, parties who afterwards become partners in that firm are not to be considered as agreeing to impose upon themselves a liability for anything more than that which by the books themselves, which are handed over to the new firm, appears to be due to the customer. In order to render the new firm liable for the amounts which do not so appear upon the books, it is necessary to show that the old firm have ceased to be liable and are discharged; and

(*r*) *De Berkon* v. *Smith*, 1 Esp. 29.
(*s*) *Alderson* v. *Pope*, 1 Camp. 403, n.
(*t*) *Fox* v. *Clifton*, 4 M. & P. 713.
(*u*) Parke, J., *Dickinson* v. *Valpy*, 10 B. & C. 140; Ld. Kenyon, 1 Esp. 30.
(*x*) *Carter* v. *Whalley*, 1 B. & Ad. 14.
(*y*) *Vice* v. *Lady Anson*, 7 B. & C. 411.
(*z*) *Wilson* v. *Lewis*, 2 Sc. N. R. 118.
(*a*) *Wilson* v. *Bailey*, 9 Dowl. 20; *Whitehead* v. *Barron*, 2 M. & Rob. 248.

in order to do so you must show an agreement between the old and the new firm and the customer, that the new firm is to be considered as substituted as the debtor in lieu of the old, for the amount sought to be recovered. There may be cases in which the new firm agrees to become liable for the actual, not the apparent, balance" (*b*). The transfer of the accounts from the old to the new firm, and the acceptance by the creditor of a new simple contract security from the new firm for the debt due to him, is not of itself sufficient to discharge a retiring partner. There must be an agreement, either express or fairly to be inferred, to discharge the old firm (*c*). Two bankers, partners, gave deposit notes to depositors who, when the amounts on deposit were increased or diminished, gave up their old notes, and received fresh ones. Two other partners were admitted, and notice given to the depositors. The first two partners died, and the depositors knew it, and made no claim against their estates. The business was carried on under the old name by the new partners, and the depositors received interest from them. Some retained their old notes, and some took fresh ones. The new partners being bankrupt the depositors proved for the amounts due on their notes as money "advanced and lent" to the bankrupts. It was held that there was a complete novation, and that none of the depositors were entitled to prove against the old firm (*d*). If the creditor elects to sue the new firm he cannot afterwards sue a retired partner (*dd*). Where a firm was newly constituted, but no alteration was made in the business, and the accounts were continued in the old books, and the existing liabilities were discharged from the assets of the old firm or from the funds of the new firm indiscriminately, it was held that this was cogent evidence that the new firm had assumed the liability to pay the debts of the old firm (*e*). Where creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debt out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor (*f*).

Notice of retirement of partners, and of the dissolution of the co-partnership.—If once a person holds himself out as being a partner, till he gives notice that he has ceased to be so, those who deal with the firm upon the faith of the supposed partnership may consider him as a partner, and he is bound by that representation (*g*). The retirement of an ostensible partner ought to be

(*b*) *Craufurd* v. *Cocks*, 6 Exch. 291.

(*c*) *Harris* v. *Farwell*, 15 Beav. 31; *Brown* v. *Gordon*, 22 *ib.* 68; *Kirwan* v. *Kirwan*, 2 Cr. & M. 617.

(*d*) *Bilborough* v. *Holmes*, 5 Ch. D. 255.

(*dd*) *Scarf* v. *Jardine*, 7 Ap. Cas. 345.

(*e*) *Bank of Australasia* v. *Flower*, L. R. 1 P. C. 27; 35 L. J. C. P. 13.

(*f*) *Bank of Australasia* v. *Flower*, L. R. 1 P. C. 27; 35 L. J. P. C. 13.

(*g*) *Goode* v. *Harrison*, 5 B. & Ald. 157.

made as notorious as the fact of his connexion with the firm. A notice in the *London Gazette* is insufficient, unless there is a reasonable presumption that the paper has been seen and read by the parties dealing with the firm. "Many people there are who never see a Gazette to the day of their deaths; and very mischievous would be the consequences, if they were bound by a notice inserted in it" (*h*). And, even if the advertisement is inserted in a paper which a plaintiff who is suing a retired partner is in the habit of reading, the insertion, unless it has been frequently repeated, is of itself very meagre evidence of the plaintiff's knowledge of the fact (*i*). The only certain and secure way of putting an end to the continuing liability is to insert frequent advertisements of the retirement of the partner in all the papers having the greatest circulation in the immediate neighbourhood of the place where the business of the co-partnership is carried on, and to send express notice to every person residing at a distance who has been in the habit of dealing with the partnership during the time that the retiring partner was a member of the firm (*k*).

Retirement of dormant partners.—Dormant and secret partners may release themselves from all further liability by a simple relinquishment of their share in the profit and loss of the business. They continue responsible upon all executory contracts and transactions in actual operation at the time of their withdrawal; but they are not liable upon the subsequent contracts of the firm and the debts and liabilities incurred after their retirement (*l*). But, if they are not strictly secret as well as dormant partners, notice of the termination of their connexion with the co-partnership must be given (*m*).

When a partnership or trading association is under the management of trustees or directors, the common law power of one partner to bind another existing in ordinary trading partnerships ceases; and notice to a party that there are trustees or directors is notice to him that he is not dealing with an ordinary partnership (*n*). The shareholders or partners are liable only upon contracts made by the trustees or directors in the ordinary course of business, in the same manner as dormant partners in any ordinary partnership. But no private agreement between the shareholders and directors, restricting the apparent general authority of the latter to bind the former by their contracts, or qualifying and limiting the liability of the shareholders upon such contracts, will be of any avail as

(*h*) Ld. Kenyon, *Graham* v. *Hope*, Peake, 208.

(*i*) *Jenkins* v. *Blizard*, 1 Stark. 420.

(*k*) *M'Iver* v. *Humble*, 16 East, 169; *Newsome* v. *Coles*, 2 Campb. 617; *Hart* v. *Alexander*, 2 M. & W. 490; *Barfoot* v. *Goodall*, 3 Campb. 148; *Lacy* v. *Woolcott*, 2 D. & R. 460.

(*l*) *Carter* v. *Whalley*, 1 B. & Ad. 11.

(*m*) *Farrar* v. *Deflinne*, 1 C. & K. 580.

(*n*) Parke, B., *Hallett* v. *Dowdall*, 21 L. J. Q. B. 105.

against the claims of creditors of the partnership who have dealt with the directors in ignorance of the particular limitations and restrictions placed upon their apparent general authority (*o*).

Authority of committeemen.—Where a review was established by an assoiciation of shareholders, who passed certain written resolutions for its regulation and management, and appointed a committee of shareholders "to assist the editor in promoting the prosperity and circulation of the review, and to obtain literary contributions," it was held that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the review (*p*).

Liabilities of partners upon deeds.—In order to make a partner liable upon a deed, it must be shown that he actually sealed and delivered the deed in person, or that it was done by another for him, in his presence, and by his commandment (*q*); or, if executed by one partner on behalf of the firm generally, as the deed of the partnership, it must be shown that the partners sued upon it authorised their co-partner to execute the deed by a power of attorney under seal, and the authority under seal, when it exists, must be produced and proved (*r*). Where one of two partners caused a bond to be made out in the name of the firm, "Davis and Marsh," and sealed and delivered it as the deed of the partnership, it was held that it could not bind the other partners, as they had given their co-partner no authority under seal to enter into and execute deeds in their behalf, or on behalf of the firm (*s*). But the bond being joint and several, would bind the partner who signed it (*t*); and a deed purporting to be made by all the partners of the firm, and only signed by one, binds that one although the other partners afterwards decline to sign it (*u*). A general partnership agreement, though under seal, does not authorise the partners to execute deeds for each other, unless a particular power be given for that purpose (*v*).

Of corporations aggregate.—The effect of a general and unqualified incorporation of two or more persons, at common law, is to create an aggregate body politic, or legal entity, with rights and liabilities completely separate and distinct from the individual existence, rights, and liabilities of its members. This legal entity is, as it has been sagely remarked, without soul or conscience, and

(*o*) *Hawken* v. *Bourne*, 8 M. & W. 709; *Rex* v. *Dodd*, 9 East, 527; *Walburn* v. *Ingilby*, 1 M. & K. 76.

(*p*) *Heraud* v. *Leaf*, 17 L. J. C. P. 57.

(*q*) *Ball* v. *Dunsterville*, *ante*, p. 20.

(*r*) *Steiglitz* v. *Egginton*, Holt, N. P. C. 141.

(*s*) *Elliott* v. *Davis*, 2 B. & P. 338.

(*t*) *Elliott* v. *Davis*, *supra*.

(*u*) *Bowker* v. *Burdekin*, 11 M. & W. 128; *Cumberledge* v. *Lawson*, 1 C. B. N. S. 709.

(*v*) *Harrison* v. *Jackson*, 7 T. R. 210.

without any visible or outward form, and cannot, therefore, be either excommunicated, or outlawed, or arrested. It could only in former times be compelled to answer in an action at law by a *distringas* against its goods and chattels, and could only appear by attorney appointed under its common seal; and, if it had neither lands nor goods, there was no way of bringing the corporate body either into a court of law or a court of equity. Its debts are, at common law, its own debts, and not the debts of the individual members thereof; and the latter, consequently, are not answerable either in their persons or property for the corporate debts; and, if there are no corporate effects whereon to levy judgments and executions obtained against the body corporate, the creditors must go unpaid (*x*). Amongst the powers and privileges possessed by the body corporate from the mere act of incorporation, and without any special provision or stipulation in the charter, is the power of making bye-laws for the government of the body politic, subject to the laws of the realm and subordinate thereto (*y*), and the power (in the case of ancient corporations) of electing its own members at corporate meetings, and appointing its own officers; of suing and being sued in the corporate name; of holding and enjoying property in such name; of purchasing and parting with its possessions; of compromising claims against it (*y y*); and of acting and speaking through a common seal, which is said to be "its hand and mouth-piece." Corporations cannot lawfully purchase or hold lands without the licence of the crown, or the authority of parliament (*z*); and they cannot, consequently, lawfully enter into or enforce real contracts concerning lands without a licence or authority to hold lands.

Contracts with corporations.—All contracts of importance entered into by corporations must, with some exceptions presently noticed, be made under the common seal of the body corporate, and in the corporate name. If the contract is made in the name of the head of the corporation, or in the names of the individual members thereof, the corporate body cannot in general sue or be sued upon the contract, although the common seal has been affixed to it (*a*). If a covenant is made with a corporation by name, it is sufficient if the name and description inserted in the deed are "the same in substance with the true name; it need not be the same in words or syllables" (*b*); for, whenever there is in truth but one and the same corporation, contracts made with them ought not to be avoided by nice and verbal variances, when it plainly appears what was the

(*x*) Bro. Abr. fol. 183-186; fol. 265, pl. 82; *Edmunds* v. *Brown*, 1 Lev. 237.
(*y*) *Reg.* v. *Wood*, 5 Ell. & Bl. 49.
(*y y*) *Bath's Case*, 8 Ch. D. 334; *Hesketh's Case*. 13 Ch. D. 693.
(*z*) Co. Litt. 92, a., 2, b.
(*a*) Bro. Abr. CORPORATIONS, pl. 31; 15 E. 4, 1; Com. Dig. Franchises, F. 19.
(*b*) *Rex* v. *Haughley*, 4 B. & Ad. 655; *Sidney Sussex College* v. *Davenport*, 1 Wils. 184; *Croydon Hosp.* v. *Farley*, 6 Taunt. 467.

true name of the corporation. And there is a difference between ancient corporations and corporations made of late times; for ancient corporations may by usage have divers and several names, and leases, grants, &c., by any of them will be good enough (c). If, moreover, a corporation adopts any particular name or seal different from its true name or seal, and uses it in making contracts, it may be estopped from showing that the name and seal so adopted and used are not its true name and seal (d).

Want of mutuality of obligation.—If an executory simple contract, founded upon mutual promises and a mutuality of obligation and liability, is not binding upon a corporation by reason of its not being under the seal of the body corporate, it cannot be enforced by the corporation by reason of the absence of reciprocity or mutuality of obligation and liability (e).

Infancy in the mayor, bailiff, or other head of a corporation, or any incapacity to contract on the part of individual members thereof, do not in any way affect the rights and liabilities of the corporation in respect of corporate acts (f).

An act done by the members of a municipal corporation in the absence of the head is not the act of the corporation. Thus, if a bond be given by the commonalty in the absence of the mayor, the body corporate is not bound. But, if a mayor *de facto*, together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor; for, being in fact appointed to the office, and permitted to act in it by the corporation who might have removed him, all judicial and ministerial acts done by him are valid. Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, as much as an individual is by his own deed. But, where corporations are created by act of parliament for particular purposes, with special powers, then their deed, though under their corporate seal, regularly affixed, will not bind them, if it plainly appears that the deed is *ultra vires* (g). If the common seal has not been affixed to the contract, the general rule is, that the contract is not the contract of the corporation, but of the individual members concerned in the making of it, who can alone sue and be sued thereon (h). But this rule has been subjected to numerous exceptions, and has been almost superseded in practice in the case of trading corporations, the end and object of whose existence could

(c) *Mayor, &c., of Lynne*, 10 Co. 123, a.
(d) *Elliott* v. *Davis*, 2 B. & P. 338.
(e) *Copper Miners of England* v. *Fox*, 20 L. J. Q. B. 176; 16 Q. B. 229.
(f) 1 Kyd. 312; *Rex* v. *Carter*, 1 Cowp. 225; Bro. Abr. Corporations, 63.
(g) *Payne* v. *Mayor of Brecon*, 3 H. & N. 579.
(h) Bro. Abr. Corporations, pl. 47, 49, 50, 56, 63; 1 Roll. Abr. 514.

never be accomplished, if every corporate act was required to be authenticated under the common seal.

Implied contracts with corporations.—If a person has had the benefit of the fulfilment of a contract which could not have been enforced against a corporation whilst it remained executory, the law will raise an implied promise in its favour, upon which it may sue in its corporate character (*i*). Where, for example, a party has enjoyed all the benefit and advantage of a parol contract entered into with a corporation, he will not be permitted to discharge himself from the ordinary liability on the ground that the contract was not entered into under the common seal of the corporate body (*k*). A municipal corporation, therefore, may sue for the use and occupation of tolls not granted to the occupier under the common seal (*l*); and for the use and occupation of houses and lands, the property of the corporation, where the tenant has actually occupied and taken and enjoyed the profits of the land (*m*). And one who enters upon, occupies, and pays rent for corporate property under a demise for a term of years made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy (*n*), and the corporation may distrain for the rent (*o*). The corporation is in like manner responsible upon the ordinary implied promise in respect of the use and occupation of houses and lands, during the period it actually occupied (*p*), but no longer, as it cannot be bound by an executory contract for an interest in land not made under its common seal (*q*). So, if there has been part performance of a contract for a lease by a corporation, specific performance will be decreed, though the contract was not under the corporate seal (*r*).

Where the unsealed contract is of such a nature as to be the subject of an action for specific performance, and such contract has been in part performed under circumstances which render the equitable doctrines of part performance applicable, the contract will bind the corporation; but in other cases it is extremely doubtful whether the mere fact that a contract, not otherwise

(*i*) *Beverley* v. *Linc. Gas Co.*, 6 Ad. & E. 839; 2 N. & P. 283; *Aust. R. M. St. N. Co.* v. *Marzetti*, 11 Exch. 228; 24 L. J. Ex. 273.

(*k*) *Fishmongers Co.* v. *Robertson*, 5 M. & Gr. 192; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 139; 28 L. J. Ex. 122; *Melbourne Corp.* v. *Brougham*, 4 Ap. Cas. 156.

(*l*) *Mayor, &c., of Carmarthen* v. *Lewis*, 6 C. & P. 608.

(*m*) *Dean, &c., of Rochester* v. *Pierce*, 1 Campb. 466; *Mayor of Stafford* v. *Till*, 12 Moore, 260; 4 Bing. 77; Vin. Abr. Corporations, K. p. 41.

(*n*) *Ecclesiastical Commissioners* v. *Merral*, L. R. 4 Ex. 162; 38 L. J. Ex. 93.

(*o*) *Wood* v. *Tate*, 2 B. & P. N. R. 247.

(*p*) *Lowe* v. *London & N. W. Ry. Co*, 18 Q. B. 362; 21 L. J. Q. B. 361.

(*q*) *Finlay* v. *Brist. & Ex. Ry. Co.* 7 Exch. 416; 21 L. J. Ex. 117.

(*r*) *Steeven's Hospital* v. *Dyas*, 15 Ir. Ch. R. 405; *Crook* v. *Corporation of Seaford*, L. R. 10 Eq. 680; *ib.* 6 Ch. 551.

binding upon the corporation, has been wholly or partly performed, renders the corporation liable to be sued either on the contract or on a *quantum meruit* (s).

A corporation with a head, such as a municipal corporation, may also transact trifling matters of business, and enter into such ordinary contracts as are of constant recurrence, and the making of which forms part of its customary and usual functions, without the employment of its common seal. It may hire the ordinary servants of the corporation, such as a butler, cook, bailiff, &c., and may contract for the purchase of trifling articles without deed. "If the head of a corporation, by the intervention of a servant, buys certain things for the use of a corporation, which are actually applied to their use, they are bound by this contract, and an action may be maintained against them after the change of the head in whose time the purchase was made. So, if the regular servant of the corporation make a purchase, and apply it to the use of the corporation, it would seem that the corporation is bound" (t). Where the head of a municipal corporation gave an oral order for weights and measures, which were sent to him, and were afterwards examined at the town-hall, at a full meeting of the corporation, and approved, accepted, and used by the corporate body, it was held that the corporation was responsible for the price of the goods so ordered (u). So a contract for the admission of a ship into a dock for repairs has been held not to require a seal (v). If a municipal corporation has wrongfully got possession of the money of a stranger, or the money of one of its own members, the law raises an implied promise from the corporate body to refund the amount, just the same as in the ordinary case of the receipt of money by a private individual which the latter has no right in conscience or equity to retain (x). But in all matters of consequence and importance, and in respect of acts and contracts not coming within the scope of its ordinary, everyday functions, the corporation is not bound by the act done, unless it is a corporate act authenticated by writing under the common seal (y).

At a meeting of the town council of a municipal corporation, a resolution was entered in the corporation books, to the effect that the salary of the town clerk should be increased; but it was held

(s) *Hunt* v. *Wimbledon Local Board*, 3 C. P. D. 208; *per* Lindley, J., where the authorities are collected; and S. C. in C. A.; 4 C. P. D. 48. See also *Young* v. *Corporation of Leamington*, 8 Q. B. D. 579. Agent appointed under seal made a contract not under seal; held not binding.

(t) 1 Kyd. 313, 314, citing *Longo Quinto* (Ed. 4), 70-74.

(u) *De Grave* v. *Mayor, &c., of Monmouth*, 4 C. & P. 111.

(v) *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402.

(x) Ld. Denman, *Hall* v. *Mayor, &c., of Swansea*, 5 Q. B. 547; 13 L. J. Q. B. 112.

(y) *Mayor, &c., of Ludlow* v. *Charlton*, 6 M. & W. 815.

that the corporate body was not bound by this resolution, as it had not been made under the common seal (z). So, where the London Dock Company accepted by parol, through their clerk, a tender by a contractor to cleanse the docks for a year for a certain sum, and the contractor refused to fulfil his engagement, it was held that the company could not enforce the contract, as the offer had not been accepted under their common seal (a). And, where the guardians of a union, a corporate body by statute, entered into a contract under their common seal with the plaintiff for the making of a survey and map of one of the parishes in the union, which contract was duly fulfilled, and, subsequently, in consequence of a reduced plan being directed to be made, the plaintiff prepared an outline map on a reduced scale, which was received and used by the guardians, but no contract was entered into by them under their common seal to pay the price thereof, it was held that they were not responsible in their corporate capacity for the payment of this outline map, inasmuch as the preparing of a plan in order to have a parochial assessment made was no part of the duty of the guardians, and was not essential for the carrying out of the purposes or objects for which they were incorporated (b). So the contract for the engagement of a clerk to the master of a workhouse by a board of guardians, must, in order to bind the guardians and render them liable for a wrongful dismissal, be under their seal (c). But, where iron gates and water-closets were made and erected at the union workhouse, pursuant to an oral order given by the guardians, it was held that the guardians were responsible in their corporate capacity for the payment of the price of them, as they were necessary for carrying out the purposes for which the guardians were incorporated; and it was laid down as a general rule of law by the Court of Queen's Bench that, wherever the purposes for which a corporation is created render it necessary that work should be done and goods supplied, to carry such purposes into effect, and orders are given at a board regularly constituted, and having general authority to make contracts for such work or goods, and the work is done and the goods supplied and accepted by the corporation, and the whole consideration for payment executed, the corporation cannot keep the goods or the benefit, and refuse to pay on the ground that, though the members of the corporation who ordered the goods or work were com-

(z) *Reg.* v. *Mayor, &c., of Stamford*, 6 Q. B. 433; as to orders for the payment of money out of the borough fund, see *The Queen* v. *Mayor, &c., of Warwick*, 15 L. J. Q. B. 306.

(a) *London Dock Co.* v. *Sinnot*, 1 Ell. & Bl. 347; 27 L. J. Q. B. 129.

(b) *Paine* v. *Guard. Strand Un.*, 8 Q. B. 326; 10 Jur. 308; *Lamprell* v. *Billericay Un.*, 3 Exch. 307; *Smart* v. *West-ham Un.*, 10 Exch. 875; 24 L. J. Ex. 201.

(c) *Austin* v. *Guardians of Bethnal Green*, L. R. 9 C. P. 91.

petent to make a contract and bind the rest, the formality of a deed, or the affixing the seal, were wanting (*d*). Where, therefore, a corporation employed the plaintiff as an accountant to go through its books, and audit its accounts, it was held that the services rendered were essential to the accomplishment of the purposes for which the corporation was created, and that the corporation was responsible upon an implied contract for remuneration (*e*). So, where the plaintiff supplied coals from time to time to the defendants, the guardians of a poor-law union, for the use of their workhouse, under articles of agreement executed by the plaintiff, but not under the seal of the defendants, it was held that, as the goods were such as must necessarily be from time to time supplied for the very purposes for which the defendants were incorporated, they were liable to pay for the coals, although the contract was not under seal (*f*).

"The appointment of an attorney to conduct important suits affecting the rights and property of a municipal corporation must in general be under seal, except in the case of the city of London, who appoint an attorney by warrant of attorney in the Queen's Bench every year, without either sealing or signing, and are estopped by the record to say it is not their act" (*g*). Corporations remain always the same as to debts and rights, so that, if an old corporation is incorporated by a new name, it may recover in its new name debts contracted with the old corporation (*h*). A corporation revived by a new charter has all its rights revived and put in action, and is entitled to the credits of the old corporation, and may therefore sue on a bond given to the old corporation. Where a corporation is created by an act of parliament for particular purposes and with special powers, its deed, though under the corporate seal regularly affixed, does not bind it, if it plainly appears by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the legislature meant that such a deed should not be made (*i*). But a corporation is fully capable of binding itself by any contract, except where the statutes by which it is created or regulated, expressly or by

(*d*) *Sanders* v. *Guard. St. Neots*, 8 Q. B. 810; 15 L. J. M. C. 104; *Clarke* v. *Cuckf. Un.*, 1 Bail. C. C. 85; 21 L. J. Q. B. 349; *Henderson* v. *Austral. St. Nav. Co.*, 5 Ell. & Bl. 409; 24 L. J. Q. B. 322; *Reuter* v. *Elect. Tel. Co.*, 6 Ell. & Bl. 341; 26 L. J. Q. B. 46.

(*e*) *Haigh* v. *Guard. North Brierly Un.*, El. Bl. & El. 873; 28 L. J. Q. B. 66.

(*f*) *Nicholson* v. *Bradfield Guardians*, L. R. 1 Q. B. 620; 7 B. & S. 747; 35 L. J. Q. B. 176.

(*g*) *Mayor of Thetford's case*, 1 Salk. 192; 3 Salk. 103; 2 Raym. 848; *Arnold* v. *Mayor of Poole*, 5 Sc. N. R. 776; 4 M. & Gr. 860.

(*h*) *Mayor, &c., of Scarborough* v. *Butler*, 3 Lev. 237; 7 Q. B. 339.

(*i*) Parke, B., *South York Ry. Co.* v. *Gt. Northern Ry. Co.*, 22 L. J. Ex. 314; 9 Exch. 84.

necessary implication, prohibit such contract between the parties (*k*).

Contracts with trading corporations.—Where corporations "have been established for the purpose of carrying on trading speculations, and the nature of their constitution has been such as to render the drawing of bills, or the making of any particular sort of contracts, necessary for the purposes of the corporation, the courts have held that they would imply, in those who are, according to the provisions of the charter or act of parliament, carrying on the corporation concerns, an authority to do those acts without which the corporation could not subsist" (*l*), and to do which it was expressly called into existence. The wants and necessities of a body incorporated for the purposes of trade are, of course, materially different from those of an institution established for municipal purposes and the government of towns and colleges, or local boards or urban authorities (*m*); and, if a trading corporation were unable to contract in the ordinary course of its trade, except under the common seal, its usefulness for trading purposes would be destroyed, and it would be utterly unable to accomplish the object of its existence. It has been held, therefore, that a trading corporation may maintain actions for goods sold and delivered in the usual course of its trade, and may sue upon executory contracts for the supply of goods, for the manufacture and supply of which the company was incorporated, or for the non-acceptance of goods sold, and the non-delivery of goods purchased, by the corporation (*n*). It may also draw and accept bills of exchange and promissory notes (*o*).

Contracts by the officers of trading corporations are not binding upon the corporation, unless they are within the scope of their regular employment (*p*). A station-master, guard, or clerk of an incorporated railway company, for example, has no implied authority to employ surgeons and procure medical attendance for injured passengers (*q*); but the company are liable where their credit is pledged for such services by the general manager (*r*). A clerk charged with the payment of wages, or a secretary or law agent of

(*k*) *Scottish North Eastern Ry. Co.* v. *Stewart*, 3 Macq. H. L. C. 382.

(*l*) *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 821; *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; *ib.* 4 C. P. 617; 38 L. J. C. P. 338.

(*m*) *Hunt* v. *Wimbledon Local Board*, 3 C. P. D. 48, C. A.; see also the case of *Eaton* v. *Baker*, 7 Q. B. D. 529, where under the Public Health Act, 1875, s. 200, a contract which was intended to be under £50 turned out more, and it was held not necessary to be under seal.

(*n*) *City of Lond. Gas Co.* v. *Nicholls*, 2 C. & P. 365; *Church* v. *Imp. Gas Co.* 6 Ad. & E. 859; 3 N. & P. 37; *East Ind. Co.* v. *Glover*, 1 Str. 612; *Gibson* v. *East Ind. Co.*, 5 Bing. N. C. 270, 271.

(*o*) *R.* v. *Bigg*, 3 P. Wms. 419; *Edie* v. *East India Co.*, 2 Burr. 1216.

(*p*) *Williams* v. *Chester & Holyhead Ry. Co.*, 15 Jur. Ex. 828; *Cope* v. *Thames Nav., &c.*, 3 Exch. 841: 18 L. J. Ex. 345.

(*q*) *Cox* v. *Mid. C. Ry. Co.*, 3 Exch. 273; 18 L. J. Ex. 65.

(*r*) *Walker* v. *Great Western Ry. Co.*, L. R. 2 Ex. 228; 36 L. J. Ex. 123.

a company, has no power to bind the company by statements or representations, acts or proceedings, beyond the limit of his ordinary duties and the scope of his regular employment (s). Where a contract for the performance of work and the supply of materials was entered into under the common seal, and extra work, not included in the contract, was performed, it was held that the company was not responsible for the payment of such extra work, as it could not be inferred they had ordered it (t).

Informal contracts where the company has had the benefit of the performance of the contract.—But, wherever the purposes for which a corporation is created render it necessary that work should be done, or goods supplied, to carry such purposes into effect, and orders are given by persons having an apparent general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done, or goods supplied, and accepted by the corporation, the corporation cannot keep the goods or the benefit of the work, and refuse to pay on the ground that the formality of a deed was wanting (u). And, wherever a company has been incorporated for carrying on a particular business, and services have been rendered in the direct course of the business which by their charter they were to carry on, and the contract for those services has been recognised and adopted at a general meeting of the company, it is not competent to the company to repudiate their liability, and refuse payment for the services rendered, on the ground that the contract was not made in conformity with the provisions of the Act of incorporation (x).

Contracts with registered joint-stock companies.—The Companies Act, 1862 (25 & 26 Vict. c. 89), enables seven or more persons, by subscribing their names to a memorandum of association, and complying with the requisitions of the Act in respect of registration, to form themselves into an incorporated company, with unlimited liability, or with liability limited by shares or by guarantee (y), and prohibits more than ten persons from carrying on in partnership the business of banking, and more than twenty persons from carrying on any other business having gain for its object (z), unless they are registered as a company under that Act, or under some previous Act (a), or are authorised so to carry on business by

(s) *Burnes* v. *Pennel*, 2 H. L. C. 497; *Olding* v. *Smith*, 16 Jur. 500.

(t) *Homersham* v. *Wolverhampton, &c., Co.*, 6 Exch. 137; *Lamprell* v. *Billericay Union*, 3 Exch. 283.

(u) *Ante*, pp. 89, 90; *Pauling* v. *London & N. West. Ry. Co.*, 8 Exch. 867.

(x) *Reuter* v. *Elect. Tel. Co.*, 6 Ell. & Bl. 349; 26 L. J. Q. B. 46; *ante*, pp. 89, 90, 91.

(y) An unlimited company may register as a limited and a limited company may re-register under 42 & 43 Vict. c. 76.

(z) *Moore* v. *Rawlins*, 6 C. B. N. S. 289; 28 L. J. C. P. 247; farming and grazing are businesses having gain for their object, *Harris* v. *Amery*, L. R. 1 C. P. 148.

(a) *Wormersley* v. *Merrit*, L. R. 4 Eq. 695; 37 L. J. Ch. 19.

act of parliament, or letters patent, or are engaged in working mines within, and subject to the jurisdiction of, the stannaries. The leading purpose of this statute is to enable a permanent company consisting of changing members to make binding contracts, and sue and be sued and do all the usual acts necessary for carrying on trade. The first part provides for the formation of the company through the medium of a memorandum and articles of association, the essential requisites of which relate almost exclusively to the rights and duties of directors and members *inter se*, regulating the name of the company, the objects for which the company is established, the limited or unlimited liability of the members, the amount of the capital, the number and amount of the shares, the transfer of shares, the registration of members, and the meetings and proceedings of the company. After registration of the memorandum of association, a certificate of the incorporation of the company is to be granted; and thereupon, by s. 18, the company becomes incorporated, having perpetual succession and a common seal, with power to hold lands. The certificate of incorporation is conclusive evidence that all the requisitions of the Act in respect of registration have been complied with (*b*).

An assignment of future calls is bad; for calls should be made at the discretion of the directors; and an assignment of future calls prevents the exercise of such a discretion, but an assignment of a call already made although not collected is good (*c*).

Requisites of contracts with registered joint-stock companies.—Before the passing of the 30 & 31 Vict. c. 131, companies could only contract without seal, where the company was a trading company, and the contract was for a purpose connected with the objects of the corporation (*d*). But now, contracts on behalf of a joint-stock company registered under the 25 & 26 Vict. c. 89, may be made (30 & 31 Vict. c. 131, s. 37) as follows:—Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing, under the common seal of the company, and may in the same manner be varied or discharged. If it is such a contract as is required by law to be in writing, and signed by the parties to be charged therewith, it may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged. If it would by law be valid as between private persons, although

(*b*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949; *Peel's case*, 36 L. J. Ch. 757; L. R. 2 Ch. 674.

(*c*) *Re Sankey Brook Coal Co.*, L. R. 9 Eq. 721; *Re Sankey Brook Coal Co.*, No. 2, L. R. 10 Eq. 381.

(*d*) *South of Ireland Coll. Co.* v. *Waddle*, L. R. 3 C. P. 463; 4 C. P. 617; 38 L. J. C. P. 338.

made by parol, and not reduced into writing, it may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and may in the same manner be varied or discharged. All contracts so made are binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators.

The company may, by instrument in writing under their common seal, employ any person (s. 55), either generally, or in respect of any specified matters, as their attorney, to execute deeds on their behalf in any place not situated in the United Kingdom; and every deed signed by such attorney on behalf of the company, and under his seal, is binding on the company to the same extent as if it were under the common seal. The 27 Vict. c. 19, moreover, enables joint-stock companies, carrying on business in foreign countries, to have official seals to be used in those countries.

Contracts by agents.—Where a company, through their directors, hold out an officer of the company as their agent for a particular purpose, they cannot afterwards dispute acts done by him within the scope of such agency (*e*); but, where an advance has been made on the personal responsibility of the agents of the company, a subsequent adoption of their acts by the directors will not make the company liable (*f*).

Contracts in violation of the provisions of the articles of association.—Parties dealing with the directors of a joint-stock company are bound to take notice that they are dealing with parties having a limited authority; and they are bound by the limitation of authority contained in the registered articles of association (*g*), unless the company at large, or the general body of the shareholders, have sanctioned acts and transactions by the directors in excess of the powers conferred upon them. If, on the other hand, the directors' have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, the person contracting with the directors is not bound to see that all those preliminaries have been observed, but is entitled to presume that the directors are acting lawfully in what they do (*h*). Unless the memorandum and articles of asso-

(*e*) *Wilson* v. *West Hartlepool Harbour & Ry. Co.*, 34 Beav. 187; 2 De G. J. & S. 475.

(*f*) *Scott* v. *Lord Ebury*, L. R. 2 C. P. 255; 36 L. J. C. P. 161.

(*g*) *Balfour* v. *Ernest*, 5 C. B. N. S. 624; 28 L. J. C. P. 170; *Shrewsbury (Earl)* v. *North Staffordshire Ry. Co.*, L. R. 1 Eq. 593; 35 L. J. Ch. 596; *In re Pooley Hall Co.*, 18 W. R. 201, see *English Channel Co.* v. *Rolt*, 17 Ch. D. 713.

(*h*) *Royal British Bank* v. *Turquand*, 6 E. & B. 327; *Mahony* v. *East Holyford Mining Co.*, L. R. 7 H. L. 869, see *Irving* v. *Union Bank of Australia*, 2 Ap. Cas. 366. Where by the articles "the business is to be conducted by not less than" a specified number, the condition is imperative, *Bottomley's Case*, 16 Ch. D. 681.

ciation of a company contain in plain terms an express power enabling the company to purchase their own shares, such purchase is *ultra vires* although the company may be empowered to deal in shares of joint-stock companies generally (*i*). If a company has no power to do a particular thing, that power cannot be added to the company by the agreement of the shareholders (*k*); but, if a company has power to do a thing, and there be only requisite a particular formality, such as the consent of a general meeting, in order to warrant the exercise of the power, then acquiescence may be inferred from delay, and a knowledge of the transaction imputed to every shareholder (*l*); and an agreement originally *ultra vires* cannot be impeached after the lapse of considerable time (*m*). Where the deed of settlement of a fire insurance company directed that, in every policy issued by the directors, the funds of the company should alone be made answerable for claims under such policy, and policies were issued by the authority of the directors not confining the liability to the funds of the company, and not complying with the provisions of the deed of settlement in other respects, it was held that the policies were not binding upon the company (*n*). But it does not follow that a deed under the seal of the company *boná fide* entered into, is absolutely void, if any formality which is prescribed by the articles of association has been omitted. To hold this to be the case would have the effect of vesting in these companies "an unlimited power of repudiation;" and this would be an unlimited power to defraud (*o*). There may be a breach of duty on the part of the directors, in neglecting to comply with certain formalities, in respect of which they are responsible to the shareholders; but it does not follow that the contract is void as against the company (*p*). Where a harbour company was empowered by act of parliament to raise money by mortgage, and it was provided that the mortgages should be entered in the books of the company by their clerks, who were to indorse on such mortgages a memorandum of such entry, and it was also provided that, until the entries and indorsements were made, the mortgages should "not be valid or effectual," and money was borrowed by the company on mortgage, and the mortgage was entered in the company's books, but no

(*i*) *In re London, Hamburg, & Continental Exchange Bank, Zulueta's claim*, L. R. 5 Ch. 444.

(*k*) *Ashbury Carriage Co.* v. *Riche*, L. R. 7 H. L. 653.

(*l*) *British Provident Life & Fire Ins. Soc., in re*, 32 L. J. Ch. 326; but see *Brotherhood's case*, 31 Beav. 365.

(*m*) *Smallcombe's case*, L. R. 3 Eq. 769; 3 H. L. 249; *Holdsworth* v. *Evans*, L. R. 3 H. L. 263; see however *Spackman's case*, L. R. 3 H. L. 171; *Stanhope's case*, L. R. 1 Ch. 161.

(*n*) *Hambro'* v. *Hull & London Fire Ins. Co.*, 3 H. & N. 789; 28 L. J. Ex. 62.

(*o*) Ld. Campb. *Prince of Wales Ins. Co.* v. *Harding*, Ell. Bl. & Ell. 216; 27 L. J. Q. B 307.

(*p*) *Agar* v. *Athenæum Life Ass. So.*, 3 C. B. N. S. 756; *In re Bonelli's Telegraph Co.*, L. R. 12 Eq 246; 40 L. J. Ch. 567.

memorandum of such entry was indorsed on the mortgage by the clerk, pursuant to the requirements of the act of parliament: it was nevertheless held that the company could not set up their non-compliance with the Act in order to defeat the claim of their mortgagee; for it was obvious that the legislature never intended to put it in the power of the company to defeat their own securities by their own default, and so commit a gross fraud (*q*).

The power of giving a bill of sale as a security for debts is incident to a trading company, although it is not expressly conferred by the articles of association (*r*). So also is the power of raising money or giving security for a past debt by deposit of title deeds (*s*).

Parties who have contracted with the directors of a registered joint-stock trading company, in matters relating to the co-partnership business, are not bound, when seeking to enforce their contracts against the company, to show that the directors were authorised by the articles of association to enter into them. *Primâ facie* the directors have the necessary authority; and the burden of proving that the directors were restrained by the regulations of the company from making the particular contract sought to be enforced, and from binding the company thereby, lies upon the defendants. If managers, secretaries, or directors are appointed to carry on the business of a trading company, parties dealing with the company are not bound to inquire whether their agents or officers are properly appointed or not. If they exercise the duties of their office notoriously, and order goods which are received and used by the company in the ordinary course of its business, the company is responsible for payment thereof (*t*). But, if the contract sued upon has no relation to the business carried on by the company, and is not within the scope of any implied authority given for the purpose of managing and conducting the business thereof, the plaintiff is bound to prove affirmatively that the directors who profess to bind the company by the contract were duly authorised so to do. This may be done by showing that any particular course of dealing has been sanctioned by the directors and acquiesced in by the shareholders, or that the unusual contract has been sanctioned by a board meeting at which the requisite number of directors was present (*u*). Persons employed by the directors of a company to supply goods, or to render any services for the purposes and requirements of the company, cannot be

(*q*) *Jortin* v. *S. E. R. Co.*, 6 De G. M. & G. 270; 24 L. J. Ch. 343; *Prince of Wales Ass. Co.* v. *Harding*, Ell. Bl. & Ell. 183.

(*r*) *Shears* v. *Jacobs*, L. R. 1 C. P. 513; 35 L. J. C. P. 241.

(*s*) *In re Patent File Co.*, L. R. 6 Ch. 83; see also *English Channel Steamship Co.* v. *Rolt*, 17 Ch. D. 715.

(*t*) *Smith* v. *Hull Glass Co.*, 8 C. B. 676; 19 L. J. C. P. 125; 11 C. B. 897; 21 L. J. C. P. 110; *Allard* v. *Bourne*, 15 C. B. 472; *Levy* v. *Metrop. Cab Co.*, 23 Law T. R. C. P. 67.

(*u*) *Ridley* v. *Plym., Grind., &c.*, 2 Exch. 716; 17 L. J. Ex. 252.

expected nicely to investigate the objects for which they are employed, and to resort, in every case, to the deed of settlement for the purpose of ascertaining whether those objects are or are not in accordance with its provisions and with the trusts reposed in the directors (*v*). Where a company has power to enter into a contract for the purchase of goods, it is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although this fact may be known to the person with whom the contract is entered into (*x*). But, whenever a party dealing with a joint-stock company knowingly combines with the directors to do any act *ultra vires* to the prejudice of the shareholders, then the shareholders may very fairly deny their liability (*y*).

Liability of Shareholders.—Every company limited under the Act, whether limited by shares or by guarantee (s. 41), must keep its name painted or affixed in a conspicuous position, and in letters easily legible, on the outside of its office or place of business, and must have its name in legible characters on its seal, and on all its notices, advertisements, and official publications, and in all its bills, notes, endorsements, cheques, orders, bills of parcels, invoices, receipts, and letters of credit. All officers of the company, and persons acting on its behalf, disobeying the statute, are subjected (s. 42) to various personal liabilities in respect of their contracts and proceedings in the matter (*z*). If the company carries on business for a period of six months, after the number of the members has been reduced to seven, every person who is a member during that period is liable (s. 48) for the whole debts of the company then contracted.

Effect of the winding-up order.—*Bonâ fide* dispositions of property of a company in the ordinary course of its trade, made after the presenting of a petition for winding up, and completed before the winding-up order, will, in the exercise of the discretion given to the court by the Companies Act, s. 153, be confirmed (*zz*). Where, however, such dispositions are incomplete, and rest in contract at the time of the winding-up order, the court has no discretionary power to order the contract to be fulfilled; and the person with whom it was entered into, though he has paid his money, has only a general claim as a creditor for damages in respect of the breach of contract (*a*).

(*v*) *Green* v. *Nixon*, 3 Jur. N. S. 994; 27 L. J. Ch. 819.

(*x*) *Re Contract Corporation*, L. R. 8 Eq. 14.

(*y*) *Prince of Wales Insurance Co.* v. *Harding*, Ell. Bl. & Ell. 217; 27 L. J. Q. B. 307.

(*z*) *Penrose* v. *Martyn*, 28 L. J. Q. B. 28; Ell. Bl. & Ell. 499.

(*zz*) See *Ince Hall Mills Co.* v. *Douglas Forge Co.*, 8 Q. B. D. 179.

(*a*) *Wiltshire Iron Co., in re, ex parte Pearson*, L. R. 3 Ch. 443.

An agreement for a general lien on the goods of a company is determined by the winding-up order, at all events as to after-acquired property (*b*).

Where a customer of a trading company had *bonâ fide* ordered and paid for goods, and the company had loaded the goods on a railway to his address, and sent him the invoices, after the presenting of the petition, but before the winding-up order, it was held that the disposition of the property was complete before the winding-up order, and the goods were ordered to be delivered to the customer (*c*).

Contracts with official and other liquidators are regulated by the 25 & 26 Vict. c. 89 (*d*). A liquidator appointed under a resolution to wind up voluntarily is not personally responsible to the solicitor employed by him on the affairs of the liquidation for any of the costs of such liquidation (*e*). Where a company is being voluntarily wound up, and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company (*f*).

Contracts with railway companies.—Where a public act of parliament limits and defines the authority of a railway company, and provides for the application of all the funds that come into the hands of the corporation or the directors, a contract for the accomplishment of objects not sanctioned by the act of parliament is illegal and void (*g*); and the assent of all the shareholders to such a contract, though it may make them all personally liable to perform the contract, will not bind them in their corporate capacity, or render liable the corporate funds (*h*). Incorporated railway companies have no existence independently of the Acts which create them; and they are created by parliament with special and limited powers and for limited purposes. When, therefore, they exceed, or attempt to exceed, their powers, they are acting in contravention of the law which established them, and in opposition to what courts of justice are bound to consider to have been the intention of parliament in their creation (*i*).

(*b*) *Wiltshire Iron Co. Lim.* v. *Great Western Ry. Co.*, L. R. 6 Q. B. 101, 776.

(*c*) *Wiltshire Iron Co.*, *in re*, L. R. 3 Ch. 443.

(*d*) See sects. 99 & 133.

(*e*) *In re Trueman's Estate, Hooke* v. *Piper*, L. R. 14 Eq. 278; 41 L. J. Ch. 585.

(*f*) *London & Mediterranean Bank*, *in re*, *ex parte Birmingham Banking Co.*, L. R. 3 Ch. 651; 36 L. J. Ch. 807; *Ex parte Agra & Masterman's Bank*, L. R. 6 Ch. 206; *Bolognesi's case*, L. R. 5 Ch. 567; 40 L. J. Ch. 26.

(*g*) *Taylor* v. *Chichester & Midhurst Ry. Co.*, L. R. 2 Ex. 356; 36 L. J. Ex. 201; *Atty.-Gen.* v. *Great Northern Ry. Co.*, 1 Drew. & Sm. 154; *Atty.-Gen.* v. *Great Eastern Ry.*, 5 Ap. Cas. 473.

(*h*) *Colman* v. *Eastern Counties Ry. Co.*, 10 Beav. 1.

(*i*) *Shrews. & Birm. Ry. Co.* v. *Lond. & N. W. Ry. Co.*, 22 L. J. Ch. 683; *East. Angl. Ry. Co.* v. *East. Co.*, 11 C. B. 775; 21 L. J. C. P. 23; *Norw.* v. *Norf. Ry. Co.*, 1 Jur. N. S. 348.

A railway company incorporated by a special act of parliament, containing the usual clauses inserted in such statutes, cannot draw, accept, or indorse bills of exchange (*k*).

Contracts by the promoters of a railway made before incorporation, for the purpose of procuring the Act of Incorporation and establishing the undertaking, cannot be enforced against the company (*l*), if they are *ultra vires* of the company (*m*); but, if not *ultra vires,* they may be enforced, if they have been adopted and acted upon by the company after it has obtained its Act of Incorporation (*n*), or if the engagement is embodied in the Act itself.

The power of directors and committees of directors to make contracts on behalf of the company may be lawfully exercised as follows :—With respect to any contract which, if made between private persons would be by law required to be in writing and under seal, the committee or the directors may make such contract on behalf of the company in writing and under the common seal of the company, and in the same manner may vary and discharge the same. With respect to any contract which, if made by private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, the committee or the directors may make such contract on behalf of the company, in writing, signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary and discharge the same; and with respect to any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, the committee or the directors may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary and discharge the same (*o*). Directors exercising the powers given by these enactments must act together and as a board (*p*); but the enactments are affirmative only, and do not preclude the enforcement against a company of the ordinary equity based on part performance (*q*).

Informal contracts for services by railway companies.—By s. 91 of the Companies Clauses Consolidation Act, 1845, "the determination as to the remuneration of the auditors, treasurer, and secretary, shall be exercised only at a general meeting of the company." If, however, the company does not think fit to make its determination

(*k*) *Bateman* v. *Mid-Wales Ry. Co.,* L. R. 1 C. P. 499; 35 L. J. C. P. 205.

(*l*) *Caledon. & Dumb. Ry. Co.* v. *Helenburgh Mag.,* 2 Macq. 409.

(*m*) *Shrewsbury (Earl)* v. *North Staff. Ry. Co.,* L. R. 1 Eq. 593.

(*n*) *Williams* v. *St. George's Harbour Co.,* 27 L. J. Ch. 691.

(*o*) 8 & 9 Vict. c. 16, s. 97.

(*p*) *D'Arcy* v. *The Tamar, &c., Ry. Co.,* L. R. 2 Ex. 158.

(*q*) *Wilson* v. *West Hartlepool Ry. & Harbour Co.,* 34 L. J. Ch. 241.

known at a general meeting, and the directors contract with a secretary to give him a certain salary, and the secretary serves the company under the contract, it is no answer to an action against the company for the stipulated remuneration to say that the remuneration he is to receive has never been determined by a general meeting of the company (r).

Of contracts with co-partnerships and associations authorised to sue and be sued in the name of their secretary, treasurer, or public officer.—In order to obviate inconveniences ensuing from changes in the members, and technical objections arising from the non-joinder as plaintiffs in an action upon a contract of all who were partners at the time the contract was entered into, acts of parliament have from time to time been procured, empowering certain banking, trading, insurance, and other companies and co-partnerships, to sue and be sued in the name of their managing officer, or their treasurer or secretary for the time being, and providing that the actions so brought shall not abate or be discontinued by the death or removal of such nominal plaintiff whilst the action is pending. The right of action of the public officer is not affected by a change in the name of the firm, or the accession of new partners or shareholders (s); and it is in general absolutely vested in him, so that the action upon all contracts entered into with the directors and trustees *must* be brought in his name, and not in the names of those who are the actual parties to the contract (t). Therefore, where a covenant was entered into with several of the co-partners of such a co-partnership *nominatim*, it was held that the action upon the covenant must nevertheless be brought by the public officer, and that the covenantees could not sue in their own names upon the covenant, the words "shall and may" in the Acts creating these co-partnerships and vesting the right of action in the public officer being obligatory and not merely permissive (u). But the power of entering into contracts on behalf of the company is not transferred to such treasurer, secretary, or public officer, but continues to reside with the directors in whose hands the management of the co-partnership is placed. The extent of the right of action of the public officer generally depends upon the construction of acts of parliament, the words of which are sometimes very large, vesting in him the right to sue upon all contracts in which the company is "concerned or *interested*," or which have

(r) *Bill* v. *Darenth Ry. Co.*, 1 H. & N. 305; 26 L. J. Ex. 81.

(s) *Wilson* v. *Craven*, 8 M. & W. 584.

(t) *Steward* v. *Greaves*, 10 M. & W. 719.

(u) *Chapman* v. *Milvain*, 5 Exch. 61; 19 L. J. Ex. 228; *Wills* v. *Sutherland*, 4 *ib.* 211; as to the death or removal of the officer during the pendency of an action, see *Barnewall* v. *Sutherland*, 9 C. B. 380.

been entered into "with any person in trust for the company," or "with any person for the use or benefit of the company" (*x*).

Liability of the public officer.—The secretary, clerk, or public officer of a company authorised by act of parliament to be sued in the name of a clerk, secretary, public officer, or other nominal defendant, is not in general personally responsible upon a judgment obtained against him (*y*), unless he is a member of the company, and responsible as such upon the judgment (*z*).

Contracts with the managers and shareholders of mining companies.—Shareholders in mining companies carried on on the cost-book principle are co-adventurers together; but they are not clothed with the ordinary liabilities of co-partners. One shareholder, for example, has no power of binding another by contract, unless he has been appointed a manager of the mine. The shareholders, moreover, are not liable upon bills or notes drawn, accepted, or made by the purser, or managers, or directors of the company, or for money borrowed by them, or their resident agent or manager, for the purpose of paying the wages of servants or workmen, or for the general purposes of the association (*a*). And there is not, it seems, as between the managers and directors of the company, any implied authority from one manager to another to draw or accept bills or make promissory notes for the purposes of the company, so as to bind the other managers without their knowledge and express concurrence (*b*). But a manager who accepts bills of exchange for the company will himself be responsible upon the acceptance, if he has accepted without any authority from the company on whose behalf he professed to act (*c*). Those persons, also, who take an active part in the management of the mine, who personally give orders for the supply of machinery, or who are present at meetings when machinery is ordered, or who receive a share of the profits of the mine, or who agree to furnish capital and receive profits, if profits are realised, are responsible for the payment of the price of things ordered and consumed in the ordinary business of the company (*d*).

Who is a shareholder.—A written acceptance of shares in a mining company signed by the defendant is evidence against him

(*x*) *Skinner* v. *Lambert*, 5 Sc. N. R. 197; *Smith* v. *Goldsworthy*, 4 Q. B. 461.

(*y*) *Wormwell* v. *Hailstone*, 4 M. & P. 512; *Harrison* v. *Timmins*, 4 M. & W. 510.

(*z*) *Harwood* v. *Law*, 7 M. & W. 203.

(*a*) *Hybart* v. *Parker*, 4 C. B. N. S. 209; 27 L. J. C. P. 120.

(*b*) *Ricketts* v. *Bennett*, 17 L. J. C. P. 19; 4 C. B. 686; *Hawtayne* v. *Bourne*, 7 M. & W. 595; *Brown* v. *Byers*, 16 M. & W. 252; *Dickenson* v. *Valpy*, 10 B. & C. 128; *Burmester* v. *Norris*, 6 Exch. 796; 21 L. J. Ex. 43.

(*c*) *Owen* v. *Van Uster*, 10 C. B. 318; 20 L. J. C. P. 61.

(*d*) *Ellis* v. *Schmœck*, 3 M. & P. 220; 5 Bing. 521; *Steigenberger* v. *Carr*, 3 Sc. N. R. 466; *Tredwen* v. *Bourne*, 6 M. & W. 465; *Hawken* v. *Bourne*, 8 M. & W. 710; *Peel* v. *Thomas*, 15 C. B. 714; 24 L. J. C. P. 86.

of his being a shareholder (e). If his name is entered in the books of the company amongst the names of the shareholders with his knowledge and concurrence, or if he has admitted that he is a shareholder, there is proof against him of his being a shareholder, although it cannot be shown that he has actually received profits or obtained any dividend upon his shares (f). If, however, no share in the mine, or right to share in the profits thereof, has been actually transferred to him, and he is not in reality a holder of shares, and has no legal interest in the concern, and has not acted as an ostensible partner, he will not be responsible as a partner; and no acknowledgment made under a mistaken supposition of his own that he is a shareholder when he is not a shareholder, will make him liable, unless it were communicated to the plaintiff so as to mislead him (g). Although the property in mining shares may pass by delivery of the certificates of proprietorship, yet the holder of the certificates does not, in general, become a shareholder until his name is entered in the share register book; and the vendor of mining shares is not, in general, discharged from liability as a shareholder until his name has been expunged from the book (h).

Insurance companies are frequently constituted, and the policies issued by them framed, upon the terms that a certain specified, subscribed capital, and the stocks, funds, securities, and property of the company, shall alone be liable to make good claims arising upon their policies, that the directors signing the policies shall not be responsible to any greater extent than the funds or property in their hands or power shall be competent to discharge, and that no proprietor shall, in any event whatever, be liable beyond the amount of the unpaid part of his share in the subscribed capital stock of the company. When this limitation of liability is made an express term of the contracts entered into between the company and third parties, these last are of course bound thereby; and, when the capital stock has been subscribed and expended, the directors and shareholders are relieved from liability upon the contract (i). So long, however, as the shareholders have not paid up the whole of their shares, and the capital stock is not all expended, the directors who seal or sign the policy are liable thereon; and they must provide funds by making calls on the shareholders (k). Where certain directors of an insurance

(e) *Toll* v. *Lee*, 4 Exch. 230; 18 L. J. Ex. 364.

(f) *Ralph* v. *Harvey*, 1 Q. B. 845.

(g) *Vice* v. *Lady Anson*, 7 B. & C. 411.

(h) *Humby, ex parte*, 28 L. J. Ch. 875.

(i) *Halket* v. *Merchi. Trad., &c.*, 13 Q. B. 960; *Hassell* v. *id.*, 4 Exch. 529; *Hickman* v. *Cambrian, &c., Ins. Co.*, 28 L. J. Ex. 379; *Prince of Wales, &c., Ass. Co. and Athenæum Soc., in re, ib.* Ch. 335.

(k) *Andrews* v. *Ellison*, 6 Moore, 206.

company, by policy under seal, ordered, directed, and appointed that the capital, stock, and funds of the company should stand charged with, and be liable to pay, £500 to the plaintiff, it was held that this was a personal covenant on the part of the directors to pay if the funds proved adequate, and that they were individually liable thereon, unless they could show that the company was insolvent (*l*). In a contract of this kind the whole body are not made joint contractors; but each individual of the company is bound to make good the loss in the same proportion as his share bears to the total capital, in the nature of a separate underwriter; and the individual proprietors are not responsible for any others than themselves (*m*). If the limitation of liability is not made part of the contract with the company, and the parties dealing with the company have no notice of it, they will of course not be bound by it (*n*). A policy under the seal of the company cannot be avoided merely by showing that some of the formalities required by the deed of settlement, in order to render the contract binding on the company, have not been complied with (*o*). But an ordinary local agent of an insurance company is not, without special authority, authorised to bind the company by a contract to grant a policy (*p*).

Of contracts with banking co-partnerships.—The mere shareholders of a co-partnership under the management of trustees or directors have no authority to contract for one another, or to pledge the credit of the co-partnership (*q*); but the directors appointed to carry on the business have impliedly all such of the ordinary powers of partners in a common mercantile partnership as are necessary for carrying on the business for which the company is formed; and, where a banking co-partnership is established, the directors are considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed, unless the power is excluded by the express provisions of the deed of settlement. They have authority, therefore, to give promissory notes, or to accept bills of exchange, so as to bind themselves and the other shareholders; and, if there is any objection in point of form to the validity of the bills or notes, the money obtained upon them by the directors may be recovered as money lent to the company. If there is any irregularity in the trans-

(*l*) *Gurney* v. *Rawlins*, 2 M. & W. 90; *Dawson* v. *Wrench*, 3 Exch. 359.

(*m*) *Hallett* v. *Dowdall*, 18 Q. B. 2; 21 L. J. Q. B. 98; *Reid* v. *Allan*, 4 Exch. 326.

(*n*) *Gordon* v. *Sea, &c., Ins. Soc.*, 1 H. & N. 599; 26 L. J. Ex. 202; *State Fire Ins. Co.*, 32 L. J. Ch. 300.

(*o*) *Prince of Wales Ass. Co.* v. *Harding*, Ell. Bl. & Ell. 217; 27 L. J. Q. B. 307.

(*p*) *Linford* v. *Prov. Horse, &c., Ins. Co.*, 34 Beav. 291.

(*q*) *Burnes* v. *Pennell*, 2 H. L. C. 521.

action, and the shareholders lie by and acquiesce in the irregularity, they will be deemed to have subsequently ratified the acts of the directors (*r*). If the manager of the bank is intrusted with a general power of accepting, making, and indorsing bills and notes, an innocent indorsee will not be prejudiced by any irregularity in his mode of exercising it; but, if he has only a special and limited authority, and the indorsement conveys an express intimation to that effect, the indorsee must, at his peril, make inquiry as to whether or not the authority has been properly exercised, before he advances his money upon, or gives credit to, the indorsement (*s*).

Banking co-partnerships established under the 7 *Geo.* 4, *c.* 46, are authorised (s. 9) to sue and be sued in the name of one of the public officers as the nominal plaintiff or defendant; and every judgment and decree obtained against the public officer is to operate (s. 12) as a judgment against the co-partnership, and execution may be issued thereon (s. 13) against any co-partner for the time being; and, if the judgment is not satisfied, it may then be issued against any person who was a member of the co-partnership at the time when the contract on which such judgment was obtained was entered into, or became a member at any time before such contract was executed, or was a member at the time such judgment was obtained, provided leave is granted by the court in which the judgment was obtained, after notice to the person sought to be charged, and before the expiration of three years from the time such person shall have ceased to be a member of the co-partnership (*t*).

Liabilities of provisional directors and committeemen.—All persons who take an active part in working out a project, who attend meetings at which resolutions are made, or orders given, for the employment of agents or servants, or the supply of goods in furtherance of a joint undertaking, render themselves in general jointly responsible for the remuneration and payment of the services rendered, or goods supplied, in obedience to the orders so given (*u*). Every person, also, who holds himself out, or permits himself to be published to the world, as one of the acting committeemen or managers of a projected company, may become

(*r*) *Maclae* v. *Sutherland*, 3 Ell. & Bl. 1; 23 L. J. Q. B. 229; *Bank of Australasia* v. *Bank of Australia*, 12 Jur. 195.

(*s*) *Alexander* v. *Mackenzie*, 6 C. B. 766; *Eyre* v. *MacDowell*, 14 Ir. C. L. R. 332; *Stagg* v. *Elliott*, 12 C. B. N. S. 373; 31 L. J. C. P. 260.

(*t*) Parke, B., *Dodgson* v. *Scott*, 17 L. J. Ex. 326. 7 & 8 Vict. c. 32, s. 26, as to banking co-partnerships carrying on business within sixty-five miles of London. See also the 27 & 28 Vict. c. 32, as to banks which have discontinued the issue of their own bank-notes.

(*u*) *Braithwaite* v. *Skofield*, 9 B. & C. 402; *Lake* v. *Duke of Argyll*, 6 Q. B. 477; *Glenester* v. *Hunter*, 5 C. & P. 65; *Kerridge* v. *Hesse*, 9 C. & P. 200; *Burls* v. *Smith*, 5 M. & P. 735.

chargeable to parties who, subsequently to such announcement, have dealt with the managing committee; and all the actual and publicly reputed managers may become responsible upon orders given, or contracts entered into, by the managing committee, at meetings at which they have not been present, but not for things done pursuant to orders given before they became acting members or managers (*x*). Where the plaintiff and the defendants were desirous of starting a company to take the plaintiff's premises and stock-in-trade, and the plaintiff sent a written proposal to the defendants for the sale of his extra stock, and they sent the plaintiff a written acceptance thereof, and the proposal was directed to and accepted by the defendants "on behalf of the proposed G. R. A. H. Co. (Limited)," it was held that, as the company was non-existent at the time of the agreement, the defendants were personally liable, and that parol evidence was inadmissible to show a contrary intention (*y*).

One member of a managing committee has, in general, no authority to bind another member. If the business of the company has always been transacted through the medium of resolutions passed by a managing committee, and through orders given by the secretary, or some accredited officer of the committee, one committeeman would not be responsible for the private and individual orders and contracts of a co-committeeman, or of any of the projectors, or of the secretary, made without the knowledge and sanction of the board, and of which he has known nothing until a claim is made upon him in respect thereof. The act of a secretary not authorised by the board does not bind the board; and, if authorised by it, it binds only those members who were present and concurred in giving authority to the secretary (*z*). Where a railway company was projected, and a committee of management formed, and the defendant consented to become a member of such committee, and afterwards took the chair at one of its meetings, it was held that he was responsible for the payment of a stationer's bill, for pens, ink, and paper, supplied by the order of the secretary, for the use of the committee, after the defendant had become a member of it (*a*). A committeeman is not responsible for things ordered by the solicitor of the company, unless it be proved that the solicitor acted under an express authority from the committee (*b*). If an authority to contract on behalf of the company

(*x*) *Bailey* v. *Macaulay*, 13 Q. B. 827; *Horsley* v. *Bell*, Amb. 770; 1 Br. C. C. 101, n.; *Maudslay* v. *Le Blanc*, 2 C. & P. 409, n; *Doubleday* v. *Muskett*, 4 M. & P. 760.

(*y*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(*z*) *Burnside* v. *Dayrell*, 3 Exch. 231; *Rennie* v. *Wynn*, 4 *ib.* 697.

(*a*) *Barnett* v. *Lambert*, 15 M. & W. 489.

(*b*) *Cooke* v. *Tonkin*, 16 L. J. Q. B. 153.

or a committee is vested in eight persons, those who delegated to them the particular authority are not bound by the acts and contracts of six out of the eight (*c*). The mere attendance of a party at a meeting called to consider the advisability of a scheme, and not to carry it into effect, and at which meeting no orders are given for expenses to be incurred, or for anything to be done for the purpose of working out the project, will not render the party responsible upon orders given at subsequent meetings which he has not attended. And, if parties employed by the managing committee or directors are expressly told that they must look to the deposits for remuneration for their services, and that the members of the committee will not hold themselves personally responsible for payment, these last will then be protected from personal liability (*d*). But, if an advance is made on the personal responsibility of the promoters, the subsequent adoption of their acts by the directors after the company has been formed will not relieve them from liability (*e*). A member of a managing committee, cannot, of course, be made responsible for the price of goods ordered, or work done, or upon contracts entered into, by the committee before he became a member, or held himself out to the world as a member of it (*f*), nor after he has retired from the management (*g*). Where the defendant and others, as provisional directors of a projected company, resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for that purpose, and the secretary accordingly applied to an advertising agent, to whom (on his calling at the company's offices to inquire under what authority the secretary was acting,) he showed the prospectus and the above resolutions, it was held that there was evidence, that the directors who were parties to the resolutions were responsible for the debt thereby incurred, notwithstanding they had been induced to allow their names to appear as directors upon the faith of the secretary's assurance that all the preliminary expenses would be provided for by him and that they would incur no liability, there being nothing to show that the secretary, in giving the orders, or in communicating to the plaintiff the resolutions of the directors, had acted beyond the scope of his actual or apparent authority as secretary (*h*). But, where A. consented to his name being inserted in a prospectus as a director of a projected company, and on the

(*c*) *Brown* v. *Andrew*, 18 L. J. Q. B. 153.

(*d*) *Giles* v. *Smith*, 11 Jur. C. P. 334; *Rennie* v. *Clark*, 5 Exch. 293; *Landman* v. *Entwistle*, 7 *ib.* 632.

(*e*) *Scott* v. *Lord Ebury*, L. R. 2 C. P. 255; 36 L. J. C. P. 161.

(*f*) *Beale* v. *Mouls*, 16 L. J. Q. B. 410; *Newton* v. *Belcher*, 12 Q. B. 921.

(*g*) *Maitland, ex parte*, 23 L. J. Ch. 148.

(*h*) *Maddick* v. *Marshall*, 16 C. B. N. S. 387; 17 C. B. N. S. 829; *Riley* v. *Pakington*, 36 L. J. C. P. 204; L. R. 2 C. P. 536; *Collingwood* v. *Berkeley*, 15 C. B. N. S. 145.

prospectus being sent to him by the secretary of the company suggested alterations, and also that the company should be advertised in a particular newspaper, it was held that there was no evidence that he authorised the secretary to pledge his credit for all the expenses of advertising the company (*i*).

Powers and responsibilities of provisional committeemen.—An association of persons who have agreed to act together as provisional committeemen is not a co-partnership; and one committeeman is not impliedly the agent of another for the purpose of carrying the common object into effect. The mere fact, therefore, of a person's having agreed to become a member of a provisional committee of a projected undertaking will not render him responsible upon the contracts and for the debts and engagements of such committee; and the mere announcement of the fact in printed papers and prospectuses, issued by his authority, will not make him liable. "If not responsible as being one of the committee in fact, he cannot become so by the representation of that fact" (*k*). A provisional committeeman, who has not himself received the deposit paid on an allotment of shares, and who has taken no part in the management of the undertaking, is not responsible for the application of the deposits by the managers (*l*). But, if the general management of the business of the company is vested in a provisional committee of management, every member of such committee who takes an active part in the management will be responsible upon the contracts entered into by such committee (*m*). If there is both a provisional committee and a managing committee co-existing, the members of the latter are not in general the agents of the former, and their contracts do not bind the members of the provisional committee in the absence of express proof of agency (*n*). But, if a company starts with a provisional committee of management, consisting of a great number of persons, all of them taking a more or less active part in the management, and then another smaller managing committee is formed, so that there is both a provisional committee and a managing committee co-existing, and the provisional committee has the appointment of, and the control over, the managing committee, the members of the latter may become the agents of the former, authorised to act for them as well as on their own account (*o*).

Contracts with committees of clubs and eleemosynary institu-

(*i*) *Burbridge* v. *Morris*, 3 H. & C. 664; 34 L. J. Ex. 131.

(*k*) *Reynell* v. *Lewis*, *Wyld* v. *Hopkins*, 15 M. & W. 517; 16 L. J. Ex. 30; *Barker* v. *Stead*, 3 C. B. 946; *Patrick* v. *Reynolds*, 1 C. B. N. S. 727.

(*l*) *Burnside* v. *Dayrell*, 3 Exch. 227; 19 L. J. Ex. 46.

(*m*) *Bailey* v. *Macaulay*, 13 Q. B. 815; 19 L. J. Q. B. 73.

(*n*) *Williams* v. *Pigott*, 2 Exch. 201; *Dawson* v. *Morrison*, 16 L. J. C. P. 240.

(*o*) *Tanner*, *ex parte*, 21 L. J. Ch. 214.

tions.—The members of the managing committee of a club or charity are personally responsible for the payment of tradesmen who have supplied goods, and to servants who have performed work and rendered services, for the benefit of the club or for the advancement of the common objects of the institution, by order of the committee, as the credit is deemed to have been given to the committee, rather than to the subscribers at large, who are a constantly fluctuating body, unknown individually to the persons executing such orders (*p*). Subscribers who pay an entrance fee on admission to a club, and an annual subscription afterwards, for the purpose of forming a fund for defraying the expenses of the establishment, and who appoint a committee to administer such fund, are not themselves responsible upon the contracts and engagements, or for the debts and liabilities, of such committee (*q*), unless it can be shown that they individually concurred in, or assented to, the orders given, or authorised the committee to pledge their credit. As the members of the committee, therefore, in these cases, do not bind the subscribers at large by their contracts, or give to the persons whom they have employed a tangible third party to proceed against, they are themselves the only persons who can be sued, and are in fact principals in the transaction (*r*). If the managing committee of a club, or eleemosynary or literary institution, or any other association of persons, allow the steward or secretary, or any one of the members of the committee, to discharge the functions of the whole body, as, for instance, to order supplies of goods on credit, or to hire workmen and servants for the use of the institution, they make him their general agent, and clothe him with an implied authority to pledge their credit for the payment of the things ordered, and of the people employed by him, within the limits of the ordinary course of dealing, unless they have beforehand furnished him with sufficient funds for the purpose, and never permitted him to deal on credit.

Where the rules of a coal club were framed so as to make the secretary of the club the agent of all the members for ordering coals, and provided for payment of the coals ordered by an order on the treasurer, signed by the secretary and the chairman of the next meeting held after the delivery of the coals, it was held that the secretary was authorised to pledge the credit of the members, and that they were all responsible for the payment of coals ordered by the secretary (*s*). But members of a club are not responsible

(*p*) *Cullen* v. *Duke of Queensbury*, 1 Br. P. C. 404; 1 Br. C. C. 101.

(*q*) *Flemyng* v. *Hector*, 2 M. & W. 172.

(*r*) *Burls* v. *Smith*, 7 Bing. 705; 5 M & P. 735; *Glencster* v. *Hunter*, 5 C. & P. 65.

(*s*)

S. 440; 26 L. J. C. P. 194.

upon bills of exchange, or for the re-payment of money lent, unless they have expressly sanctioned the drawing or acceptance of bills, or the borrowing of money (*t*); nor are they responsible upon contracts made by their secretary or one of their members out of the ordinary course of business, without their knowledge. If goods have been furnished by the orders of one only of the members of the committee of management, it is a question for the jury to determine whether the goods were furnished upon the personal and individual credit of the party actually ordering them, or with the authority and on the credit of the whole body of persons managing the institution (*u*).

Contracts with trustees and commissioners of public works.—Commissioners and trustees acting in the execution of statutory powers are generally exempted from all personal liability whilst acting within the scope of the statute they are authorised to execute, but are liable to be sued in the name of their clerk or treasurer for the time being; and the public funds in their hands, derived from rates they are authorised to impose, are subjected to the payment and satisfaction of claims proved against them (*x*).

But, although trustees and commissioners of public works have a public fund at their disposal, or may be authorised to impose tolls or make rates and assessments, and so collect money for their purposes, they may nevertheless pledge their own personal credit for the fulfilment of th[illegible] contract they enter into. If they have

(*t*) *Earl Mountcash*[illegible] 14 C. B. 53; 33 L. J. C. P[illegible]

(*u*) *Todd* v. *Emly*, [illegible]; 8 M. & W. 505; *ante*, [illegible]

(*x*) If a contract [illegible] is within the scope of the [illegible] cuted by them, the pro[illegible] breach of such contract mus[illegible] the clerk, and the amount [illegible] must be paid out of the public m[illegible] in the hands or under the control of the commissioners. *Hall* v. *Taylor*, 1 Ell. Bl. & Ell. 113. If judgment is recovered against the officer authorised to be sued, and the commissioners neglect to satisfy the judgment, they may be compelled by *mandamus* to make a rate and apply it in satisfaction and discharge of the judgment debt. *Reg.* v. *Rotherham, &c.*, 27 L. J. Q. B. 156; *Ward* v. *Lowndes*, 29 L. J. Q. B. 40. Where a debt is due, the creditor is entitled to judgment, although there may be no funds for the payment of it, and the creditor may consequently never be able to enforce his judgment by execution. *Bush* v. *Martin*, 2 H. & C. 311; 33 L. J. Ex. 17. Where, by the Lunatic Asylums Act (8 & 9 Vict. c. 126), a select number of justices, called "the committee of visitors," were empowered to contract for plans for the erection of a lunatic asylum, and were enabled to sue and be sued in the name of their clerk, and provisions were made for raising funds by subscriptions and by rates, and resolutions were passed at meetings of the committee offering premiums for plans, specifications, and drawings, and appointing an architect, it was held that the committee might be sued in the name of their clerk upon the contracts authorised by these resolutions (*Kendall* v. *King*, 17 C. B. 483; 25 L. J. C. P. 132; *Cane* v. *Chapman*, 5 Ad. & E. 652), but that the members of the committee could not be made personally liable upon such contracts (*Allen* v. *Waldegrave*, 8 Taunt. 566; 2 Moore, 621), nor could execution upon a judgment recovered against the clerk be issued against him. *Wormwell* v. *Hailstone*, 4 M. & P. 512; 6 Bing. 668; but see *Cobbett* v. *Wheeler*, 7 Jur. N. S. 260. As to loans for Public Works see 38 & 39 Vict. c. 89, amended by 39 & 40 Vict. c. 31, extended by 40 & 41 Vict. c. 19; 41 Vict. c. 18; 42 & 43 Vict. c. 77; 43 & 44 Vict. c. 1. As to loans by Metropolitan Board of Works see 38 & 39 Vict. c. 65; 39 & 40 Vict. c. 55; 40 & 41 Vict. c. 42; 41 & 42 Vict. c. 37; 42 & 43 Vict. c. 25; 44 & 45 Vict. c. 48.

borrowed money not in conformity with their borrowing powers, or have exceeded their borrowing powers, and have failed consequently to charge the fund at their disposal with the re-payment of the loan, and have given the lender no remedy against the rates, tolls, or assessments they are authorised to levy, they may become personally liable, either on the ground that the money was borrowed on their own personal credit, and not on the credit of the fund (*y*), or that they falsely represented to the borrower that they had funds at their disposal for the re-payment of the loan (*z*), or that they undertook to provide funds for the purpose. They may also contract for supplies of goods, and for work and services, and may hire labourers, under circumstances giving rise to an irresistible presumption that the goods were furnished, and the work was done on the personal credit of those who gave the order or made the contract, and that the vendor or the workman looked to them for payment, and not to the funds they were authorised to collect (*a*).

Salaries of public officers—Public officers appointed by trustees and commissioners of public works, under the authority of acts of parliament, providing that their salaries shall be paid out of the rates to be raised under the authority of the Act, cannot render the persons who make the appointment personally responsible for the payment of the salary, unless they have expressly contracted to pay it (*b*). The only claim of such officers is against the rates; and, these failing, they must go unpaid (*c*). When commissioners of public works, authorised by statute to appoint an officer, are directed to pay him a salary, they impliedly contract, on making the appointment, to pay the salary out of the funds they are directed to administer, so as to give the officer who has accepted the appointment a right to sue them in the name of their clerk or treasurer (*d*), and proceed to obtain payment out of the appointed fund; but the commissioners do not incur any personal liability by virtue of the appointment, unless they have entered into an express contract to pay the salary. Whenever a public body is invested with a discretionary power respecting the amount of remuneration to be paid for a particular service, and no express contract has been entered into by the board to pay any particular sum, the court cannot interfere with the exercise of their discretion.

Contracts with local boards of health.—The public health Act,

(*y*) *Parrot* v. *Eyre*, 3 M. & Sc. 857; 10 Bing. 283.

(*z*) *Higgins* v. *Livingstone*, 4 Dow. 355; *Eaton* v. *Bell*, 5 B. & Ald. 41.

(*a*) *Horsley* v. *Bell*, Amb. 770; 1 Bro. C. C. 101, n.; *Lambert* v. *Knott*, 6 D. & R 122.

(*b*) *Bogg* v. *Pearse*, 10 C. B. 534; 20 L. J. C. P. 99; *Alexander* v. *Warman*, 6 H. & N. 100.

(*c*) *Andrews* v. *Dally*, 4 Bing. 566; 1 M. & P. 490; *Smart* v. *Guard. West Ham Un.*, 10 Exch. 875; *Addison* v. *Mayor of Preston*, 12 C. B. 108.

(*d*) *Hall* v. *Taylor*, 1 Ell. Bl. & Ell. 113.

1875 (e), by s. 173, gives power to any local authority to enter into any contracts necessary for carrying the Act into execution, and, by sect. 174, as to contracts by urban authorities, if over £50, they are to be in writing sealed with the common seal (f), and to specify the work, the price, the time, and the penalty. An estimate is to be obtained and a report made. Before a contract of £100 is made, ten days' notice and tenders are to be given, and security to be taken. Such contracts duly made will be binding on such authority and their successors, and all other parties, subject to a proviso as to compounding. Power to purchase land is given by ss. 175—178, and the mode of reference to arbitration by ss. 179—181. Powers of borrowing money are given to any local authority by ss. 233—244 (g).

It was held with regard to the former Acts that many of the requirements contained in the statutes were directory only; and a strict compliance with them was not to be treated as a condition precedent to the liability of the board upon the contracts they had entered into; for the parties with whom they contracted had no means of ascertaining whether every minute requirement of the statute had been complied with by the board prior to the making of the contract (h). The contract was, however, required to be in writing, and sealed with the common seal, in order to render the contract binding upon the rates (i). Where the members of a local board of health resolved to oppose a gas bill promoted by a public company, and employed parties to make experiments and to give evidence before a committee of the House of Commons, it was held that the members of the board who had acted in their corporate capacity could not be made personally liable to the parties they had employed (k). Where a local board entered into a contract for certain work to be done to a street, "the contractor to be paid for the work when and as the money is collected from the owners of the property adjacent," and the board was unable to collect the necessary funds from the owners by reason of the notices served upon them proving informal, it was held that there was an implied undertaking on the part of the board to do all things necessary to enable them to fulfil the contract, and that their inability by reason of the defective notice to collect the necessary funds was no answer to an action by the contractor to recover the cost of the works (l).

(e) 38 & 39 Vict. c. 55.

(f) *Hunt* v. *Wimbledon Local Board*, 3 C. P. D. 208; *ante*, pp. 90, 93.

(g) See also The Local Loans Act, 1875, 38 & 39 Vict. c. 83.

(h) *Nowell* v. *Mayor, &c., of Worcester*, 9 Exch. 467; *Cunningham* v. *Local Board of Wolverhampton*, 7 Ell. & Bl. 113.

(i) *Frend* v. *Dennett*, 4 C. B. N. S. 583; 27 L. J. C. P. 314.

(k) *Bailey* v. *Cuckson*, 32 Law T. R. 124; 7 W. R. Q. B. 16.

(l) *Worthington* v. *Sudlow*, 34 L. J. Q. B. 131.

Contracts with parish officers.—Agreements entered into by churchwardens and parishioners will, under certain circumstances, be binding upon the parish. Thus, where the plaintiff's house was so near the church that the five o'clock bell rung in the morning disturbed her, and it was agreed between her and the churchwardens and parishioners in vestry assembled, that a cupola and clock should be erected by her on the church, and that, in consideration of this being done, the five o'clock bell should not be again rung during her life, and the cupola and clock were accordingly erected, and the bell was silenced for two years, after which time it was rung again, the Court of Chancery held that the agreement was binding upon the parish, and granted an injunction against the ringing of the bell (*m*). But, as churchwardens, overseers of the poor, and parish officers, have no power of contracting so as to give any right of action against the parish, they are themselves personally responsible upon all contracts entered into by them in the exercise of the duties of their office (*n*), unless the party they have contracted with agrees to look exclusively to the funds of the parish for payment (*o*). Where the plaintiff, a baker, supplied bread to the workhouse for the use of the poor, and all the churchwardens and overseers had, at one time or another, concurred in and assented to the orders given for the bread, it was held that they were all equally responsible to the plaintiff for the payment of the price of it (*p*).

Where several parishioners attending at a vestry signed resolutions authorising the churchwardens to cause the tower of the parish church to be repaired, and the repairs were done, and a rate was made for defraying the expenses, but this rate was quashed, and one of the churchwardens was sued by the workman, and compelled to pay the whole cost of the repairs, and then brought his action against the other churchwarden who had concurred in the orders, for contribution, it was held that he was entitled to recover from him a moiety of the amount he had been compelled to pay (*q*). But there is no authority from one parish officer to bind another, resulting from the mere tenure of office. One churchwarden, for example, has no authority as such to pledge the credit of his co-churchwardens for repairs to the parish church; and, if he gives orders without their knowledge and concurrence, he cannot involve them in the liability incurred in respect of the execution of such orders (*r*). A mere honorary churchwarden, who takes no active part in the management of the parish affairs, but devolves all the

(*m*) *Martin* v. *Nutkin*, 2 P. Wms. 266.

(*n*) *Kirby* v. *Banister*, 5 B. & Ad. 1069; *Crew* v. *Petit*, 3 N. & M. 456.

(*o*) *Marsh* v. *Davies*, 17 L. J. Ex. 94; *ante*, p. 108.

(*p*) *Lambert* v. *Knott*, 6 D. & R. 122.

(*q*) *Lanchester* v. *Tricker*, 8 Moore, 20.

(*r*) *Northwaite* v. *Bennett*, 2 Cr. & M. 316.

duties of the office upon a paid colleague, cannot be made responsible for the acts and orders of the latter. And an overseer who directs money or goods to be supplied by a third party to certain poor people, cannot make his co-overseers responsible for the payment of the goods, unless they have expressly or impliedly concurred in such orders or directions, either by being present when they were given, or by being in the habit of attending meetings of the overseers and relieving officers, at which orders and directions of that description were in the habit of being given, as previously mentioned. Whether the ordering of goods or the hire of servants by one parish officer for the use of the parish creates a contract binding upon his colleagues is a question of fact depending upon the particular circumstances of each case (s). If a debt is incurred by overseers for legal proceedings in respect of parish business, their personal liability in respect thereof is not transferred, by the 11 & 12 Vict. c. 91, to their successors in office (t).

Overseers of the poor are bound to take care of casual poor within their parishes; and the law obliges them to reimburse a private individual for expenses necessarily incurred by him in procuring relief and medical attendance for a casual pauper on any sudden emergency (u). If an accident happens in the parish of A, to a pauper belonging to the parish of B., which disables the pauper, and he is then removed to his own place of abode in his own parish of B., and attended by the surgeon of that parish, the surgeon may maintain an action against the officers of the parish of A., where the accident happened, to recover a reasonable compensation for his medicine and attendance (x). But the law raises no implied promise from one parish to another in respect of relief and necessaries afforded to casual poor (y), unless the parish sued has, in some shape or another, sanctioned or authorised the relief (z). An agreement by the churchwardens, overseers, and surveyors of a parish for a lease of land to be converted into gardens for the occupation of the poor is a personal contract of their own upon which they are individually liable; and they may, consequently, be sued for the rent agreed to be paid to the owner, or for use and occupation, although they have ceased to be parish officers (a).

Moneys borrowed by poor-law guardians may be made a charge on the common fund under the provisions of the 32 & 33 Vict. c. 45, in the manner therein provided.

(s) *Eaden* v. *Titchmarsh*, 1 Ad. & E. 691; 3 N. & M. 712; *Massey* v. *Knowles*, 3 Stark. 65; *Malkin* v. *Vickerstaff*, 3 B. & Ald. 89.

(t) *Chambres* v. *Jones*, 19 L. J. Ex. 238.

(u) *Simmons* v. *Wilmott*, 3 Esp. 91.

(x) *Tomlinson* v. *Bentall*, 5 B. & C. 745; 8 D. & R. 493; *Lamb* v. *Bunce*, 4 M. & S. 275.

(y) *Atkins* v. *Banwell*, 2 East, 505.

(z) *Paynter* v. *Williams*, 1 Cr. & M. 815.

(a) *Uthwatt* v. *Elkins*, 13 M. & W. 772, 777; 5 & 6 Vict. c. 57.

By the 30 & 31 Vict. c. 106, s. 13, guardians may, with the approval of the Poor Law Board, hire, or take on lease, temporarily or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor, and the use of the guardians or their officers, without any order of the Board under seal.

The right of action in respect of parish lands and hereditaments is regulated by act of parliament, and is vested either in the churchwardens and overseers of the poor of the parish for the time being, who are empowered to take and hold parish lands in the nature of a body corporate (*b*), or in the guardians of parishes and unions under the 5 & 6 Vict. c. 57, s. 16, whereby it is enacted that it shall be lawful for every board of guardians constituted under the 4 & 5 Will. 4, c. 76, "to accept, take, and hold, on behalf of the union or parish respectively for which they may act, any lands, buildings, goods, effects, or other property, as a corporation; and in all cases to sue and be sued in their corporate name." The 59 Geo. 3, c. 12, s. 17, vests in the churchwardens and overseers of the parish all buildings, lands, and hereditaments belonging to such parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied (*c*). If lands and tenements have been originally conveyed to trustees upon trust to apply the rents and profits thereof for the benefit of the poor, or towards the repair of the parish church, and the trustees die, and there are no known trustees in existence, the legal estate vests in the churchwardens, and they are the proper parties to bring an action for the rent and for the use and occupation of the property; but, when there are known trustees in existence, their estate is not divested by the statute and transferred to the churchwardens and overseers, and the latter cannot consequently sue in respect of such lands (*d*). The right of action upon certain bonds and securities given to churchwardens and overseers of the poor under the 59 Geo. 3, c. 12, s. 7, continued vested in the churchwardens and overseers for the time being, notwithstanding the 7 & 8 Vict. c. 101, s. 61 (*e*). Vestrymen who attend parish meetings, and concur in and sign resolutions for the repairs of the church or the parish roads, for the purpose of setting the churchwardens and surveyors in motion and authorising them to act on behalf of the parish, do not incur any individual liability in respect of the carrying out of such resolutions,

(*b*) 59 Geo. 3, c, 12, s. 17; *Doe* v. *Harper*, 2 D. & R. 708.

(*c*) *Alderman* v. *Neate*, 4 M. & W. 704.

(*d*) *Churchwardens of Deptford* v. *Sketchley*, 8 Q. B. 394; *Allason* v. *Stark*, 9 Ad. & E. 255; *Ward* v. *Clarke*, 12 M. & W. 747.

(*e*) *Skelton* v. *Rushby*, 4 Exch. 545.

and of the orders given by the parish officers founded thereon. They have not, like churchwardens, the power of making a rate to provide a fund for defraying expenses; and it is notorious that they attend merely for the purpose of authorising certain things to be done which are to be paid for by a rate upon the parish; and their own individual credit and responsibility are not considered to be in anywise pledged for the payment of the expenses incurred in carrying the vestry resolutions into effect (*f*). But vestrymen, in vestry assembled, may, like any other persons, exceed their duties as vestrymen, and give their own personal undertaking in respect of the affairs of the parish. Thus, where twenty-four persons in vestry assembled signed a guarantee which was entered in the vestry minute-book to the following effect:—"At a vestry meeting, held, &c., it was moved and seconded, by, &c., that this meeting do highly approve of the proceedings taken by the present surveyor, &c., and do hereby guarantee to him all legal expenses that are or may be hereafter incurred by him in prosecuting the said suit;" it was held by Lord Tenterden that all the vestrymen who had signed the guarantee so entered in the vestry minute book had rendered themselves personally responsible for the fulfilment of their engagement (*g*).

Surveyors of turnpike roads, being the mere servants or agents of the commissioners, are not themselves in general responsible for the payment of the contractors and labourers employed upon the road (*h*).

Friendly societies.—Contracts with friendly societies are regulated by the 38 & 39 Vict. c. 60, amended by 39 & 40 Vict. c. 32, and 42 Vict. c. 9 (*i*).

Loans to friendly societies.—Where money has been lent to the directors and recognised officers or agents of a friendly society, and the money has come to the use of the society, and the members have had the benefit of the loan, the society cannot exempt itself from responsibility by showing that the directors have exceeded their borrowing powers, or that certain prescribed formalities annexed to those borrowing powers have not been complied with (*j*).

Industrial and provident societies.—Contracts with industrial and provident societies are regulated by the 39 & 40 Vict. c. 45. By the 11th section of that Act, sub-section (3), all moneys payable by a member to the society shall be a debt due from such

(*f*) *Lanchester* v. *Tricker*, 8 Moore, 20; 1 Bing. 201; *Lanchester* v. *Frewer*, 9 Moore, 688; 2 Bing. 361; *Sprott* v. *Powell*, 11 Moore, 398; 3 Bing. 478.

(*g*) *Heudebowick* v. *Langton*, 3 C. & P. 571.

(*h*) *Pochin* v. *Pawley*, 1 W. Bl. 670.

(*i*) As to contracts which are unauthorised but not illegal, see *In re Coltman*, 19 Ch. D. 64.

(*j*) *Pare* v. *Clegg*, 30 L. J. Ch. 747; 29 Beav. 589.

member to the society, and shall be recoverable as such, either in the County Court of the district in which the registered office of the society is situate, or that of the district in which such member resides, at the option of the society; and by sub-section (12), contracts on behalf of the society may be made, varied, or discharged as follows:—

(*a.*) Any contract, which if made between private persons would be by law required to be in writing, and if made according to the English law, to be under seal, may be made on behalf of the society in writing under the common seal of the society, and may in the same manner be varied or discharged:

(*b.*) Any contract, which if made between private persons would be by law required to be in writing and signed by the persons to be charged therewith, may be made on behalf of the society in writing by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged:

(*c.*) Any contract under seal, which if made between private persons might be varied or discharged at law or in equity by a writing not under seal signed by any person interested therein, may be similarly varied or discharged on behalf of the society by any person acting under the express or implied authority of the society:

(*d.*) Any contract, which if made between private persons would be by law valid, though made by parol only and not reduced into writing, may be made by parol on behalf of the society by any person acting under the express or implied authority of the society, and may in the same manner be varied or discharged:

(*e.*) A signature purporting to be made by a person holding any office in the society attached to a writing whereby any contract purports to be made, varied, or discharged by or on behalf of the society, shall *primâ facie* be taken to be the signature of a person holding at the time when the signature was made the office so stated:

And all contracts which may be or have been made, varied, or discharged, according to the provisions herein contained, shall, so far as concerns the form thereof, be effectual in law and binding on the society, and all other parties thereto, their heirs, executors or administrators as the case may be.

The dissolution and winding up of such societies is provided for by sect. 17.

It was held that under the former Acts an industrial and provident society was not liable to be sued in its corporate capacity for goods supplied before the registration, although the action was not brought until after registration (*k*). Such an action should have been brought against the committee of management (*l*). But a society formed under the 15 & 16 Vict. c. 31, and afterwards registered under the Acts subsequently in force, might sue in its corporate name upon a bond given to the trustees of the society before the passing of the latter Acts (*m*). Members of an unregistered society enrolled and certified under the old Act (15 & 16 Vict. c. 31), giving a promissory note in the following form for a debt of the society:—"Twelve months after date, we, the undersigned, being members of the executive committee, on behalf of the L. and S. W. Railway Co-operative Society, do jointly promise to pay," &c., were held personally liable (*n*).

Contracts with benefit building societies are regulated by the 6 & 7 Wm. 4, c. 32 (societies before 1874), and the 33 & 34 Vict. c. 97, s. 112 (stamps); and 37 & 38 Vict. c. 42; 38 & 39 Vict. c. 9; 40 & 41 Vict. c. 63. A rule empowering the trustees to borrow a limited amount of money for the purposes of the society was held not illegal under the old Acts (*o*). But now these societies have power under the above Acts to borrow money (*p*). Parties who sign promissory notes, or expressly contract in their own names for the repayment of money advanced to a benefit building society, cannot exonerate themselves from personal liability upon their contract merely by describing themselves on the face of it as "trustees" or "secretary" for the society (*q*).

The total amount of the loan must not at any time exceed two-thirds of the amount secured by mortgages from its members (*r*). Formerly, even where there was a power given by the rules to borrow money it must be limited; an unlimited power of borrowing is invalid (*s*).

Contracts with freehold land societies.—There is a great distinction between a freehold land society and a benefit building society. A freehold land society buys land with the funds contributed by the members of the society, and then divides it amongst

(*k*) *Linton* v. *Blakeney Joint Co-operative Industrial School*, 3 H. & C. 853; 34 L. J. Ex. 211.

(*l*) *Dear* v. *Mellard*, 32 L. J. C. P. 252; 15 C. B. N. S. 19; *Toutill* v. *Douglas*, 33 L. J. Q. B. 66.

(*m*) *Queensbury Industrial Soc.* v. *Pickles*, 3 H. & C. 857; 35 L. J. Ex. 1; L. R. 1 Ex. 1.

(*n*) *Gray* v. *Raper*, L. R. 1 C. P. 694.

(*o*) *Laing* v. *Reed*, L. R. 5 Ch. 4.

(*p*) See 37 & 38 Vict. c. 42, s. 15.

(*q*) *Price* v. *Taylor*, 5 H. & N. 542; 29 L. J. Ex. 331; *Mare* v. *Charles*, 5 Ell. & Bl. 981.

(*r*) Sect. 15.

(*s*) *Hill's case*, L. R. 9 Eq. 605. As to liability of directors for money borrowed beyond the limit, see *Looker* v. *Wrigley*, 9 Q. B. D. 397.

them; but a benefit building society advances to its borrowing members money derived from the subscriptions, which the borrowing members themselves lay out in the purchase of lands or buildings, and then mortgage them to the society. A freehold land society, whose rules authorise the directors to make speculative investments of the funds of the society in the purchase of estates, to be partitioned and divided amongst the members, cannot be registered as a benefit building society, as its objects are totally different from those of a benefit building society; and both the directors or trustees who enter into contracts for the purchase of estates, and the members or shareholders who authorise them to be made, may become personally responsible for the fulfilment of such contracts (*t*).

Salaries of officers of friendly societies.—Surveyors, secretaries, solicitors, and officers of benefit building societies and industrial and provident societies generally, have notice by the rules of the society that the remuneration for their services to the society is to be paid out of the funds of the society, so that, if the society becomes insolvent, they have no right to resort for payment to individual members. Officers of this class generally have a much greater interest in the societies to which they are attached than the trustees or directors. In the great majority of cases, they are the persons who get the society up, and at whose request the directors consent to accept office and take upon themselves the liabilities and duties of their situation; and such officers generally discharge their duties, and perform the services rendered by them to the society, with the understanding, on all hands, that they are to be remunerated out of the funds of the society; and, if the funds fail, these officers must remain unpaid (*u*).

Contracts with loan societies are regulated by the 3 & 4 Vict. c. 110, which is made perpetual by the 26 & 27 Vict. c. 56.

Contracts with registered trades unions are regulated by the 34 & 35 Vict. c. 31, amended by the 39 & 40 Vict. c. 22 (*x*).

Contracts with infants.—All individuals below the age of twenty-one years are clothed only with a qualified power of contracting. By the Infants Relief Act, 1874 (*y*), all contracts by infants, whether by specialty or simple contract, for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, are absolutely void. But this enactment does not

(*t*) *Grimes* v. *Harrison*, 26 Beav. 435; 28 L. J. Ch. 823.

(*u*) *Alexander* v. *Worman*, 6 H. & N. 100; 30 L. J. Ex. 198.

(*x*) As to insurances on the lives of children, &c., s. 28 of the 38 & 39 Vict. c. 60 (Friendly Societies Act), applies.

(*y*) 37 & 38 Vict. c. 62, s. 1; at common law these contracts were not absolutely void, but might have been ratified by the infant on attaining his majority.

invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity enter, except such as then by law were voidable.

It was held that notwithstanding the above enactment, and sect. 2, *infra*, and *post*, p. 126, an infant debtor trader might, after he has attained full age, be made a bankrupt upon an act of bankruptcy committed during infancy (*z*), but this has been overruled (*a*), unless, perhaps, where the infant has expressly represented himself to be of full age (*b*).

The contracts of an infant are binding upon him during his minority if they are necessary, and for his benefit and advantage, but speaking generally, may be avoided by him on his coming of age. The contracts of an infant which are not necessary or for his benefit or advantage, cannot be enforced against him during his minority; but at common law they might, if not by deed, have been ratified by the infant on his arriving at full age, and could then have been enforced against him. By the 9 Geo. 4, c. 14, s. 15, such ratification must have been in writing signed by the party to be charged therewith; and by the Infants Relief Act, 1874 (*c*), no action may be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age, of any promise or simple contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

In deciding whether a contract is or is not for the benefit and advantage of an infant, the Court does not always consider the circumstances of each contract; for it has been laid down that certain contracts can under no circumstances be enforced against an infant during his minority.

Thus, no penal obligations entered into by infants are enforceable, as it is not necessary for them, nor can it be for their benefit and advantage, to subject themselves to a penalty (*d*). All deeds, also, and covenants, feoffments, grants, releases, confirmations, cognovits, or other writings under seal made by infants, are, as a general rule (subject to some few exceptions presently noticed), not binding (*e*); and an infant cannot be sued on his covenant to serve contained in an indenture of apprenticeship executed by him (*f*); nor on a bill of exchange accepted by him, although the

(*z*) *Ex parte Lynch*, 2 Ch. D. 229.
(*a*) *Ex parte Jones*, 18 Ch. D. 109.
(*b*) *Per* Lush, L. J., *Ex parte Jones*, *supra*; but see *post*, p. 122, note (*l*).
(*c*) 37 & 38 Vict. c. 62, s. 2.
(*d*) Co. Litt. 172, a.; *Fisher* v. *Mowbray*, 8 East, 330; *Baylis* v. *Dinely*, 3 M. & S. 477; *Stikeman* v. *Dawson*, 16 L. J. Ch. 205; see however *Wood* v. *Fenwick*, 10 M. & W. 195.
(*e*) Co. Litt. 171, b.; *Oliver* v. *Woodroffe*, 4 M. & W. 650.
(*f*) *Gylbert* v. *Fletcher*, Cro. Car. 179.

bill may have been accepted on account of necessaries furnished to such infant (*g*); nor on a contract of suretyship (*h*); nor for a breach of warranty made by him on the sale of a horse (*i*); nor is he bound by an agreement to refer disputes to arbitration, nor by the recitals in any deed executed by him during infancy (*k*). If the infant has induced another party to contract with him by falsely representing that he was of age, he is, nevertheless, not precluded from setting up his infancy as an answer to any action founded on such contract (*l*).

Contracts also entered into by infants in the exercise of a trade cannot be enforced against them. An action, consequently, cannot be maintained against an infant who carries on trade, for work done for him, or for the rent of houses and buildings hired by him, in the course of that trade, although he gains his living thereby (*m*). An agreement with an infant workman which binds him to serve during a certain term, but leaves the master free to stop his work and his wages whenever he chooses, is not beneficial to the infant (*n*). A plaintiff cannot convert a breach of duty arising out of a contract into a tort so as to charge an infant in an action *ex delicto*. Therefore, if a horse lent to an infant is immoderately ridden by the latter and is injured, the infant is protected from liability by his infancy (*o*). And an infant innkeeper is not liable for the loss of the guest's goods (*p*). But, if the act of the infant is not an abuse of a contract, but a wrong actionable *per se*, he will not be protected from the consequences (*q*).

Land in possession of an infant is now deemed settled estate, and the Court will sell or lease it as such, and will manage the estate by trustees, see 44 & 45 Vict. c. 41, ss. 41, 42, 43.

Rights ex contractu *of infants.*—"Infancy is a personal privilege, of which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age" (*r*). Therefore, in cases of promises of marriage, contracts of purchase and sale, and contracts for the performance of work, the adult contracting party is

(*g*) *Williams* v. *Harrison*, Carth. 160; *Williamson* v. *Watt*, 1 Campb. 551; *Harrison* v. *Cotgreave*, 16 L. J. C. P. 198.

(*h*) *Maples* v. *Wightman*, 4 Conn. 376; *Allen* v. *Minor*, 2 Call. 70.

(*i*) *Howlett* v. *Haswell*, 4 Campb. 118; *Green* v. *Greenbank*, 2 Marsh. 485; *Grove* v. *Nevill*, 1 Keb. 778.

(*k*) Watson's Arbitr. 40, 41, 42; *Milner* v. *Lord Harewood*, 18 Ves. 274.

(*l*) *Bartlett* v. *Wells*, 1 B. & S. 836; 31 L. J. Q. B. 57; *De Roo* v. *Foster*, 12 C. B. N. S. 272. See, however, note (*b*), p. 121.

(*m*) *Dilk* v. *Keighley*, 2 Esp. 480; *Whittingham* v. *Hill*, Cro. Jac. 494; *Whywall* v. *Champion*, 2 Str. 1083; *Lowe* v. *Griffith*, 1 Sc. 458; 1 Hodg. 30; *Mason* v. *Wright*, 13 Met. 306.

(*n*) *Reg.* v. *Lord*, 12 Q. B. 765; see *Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229.

(*o*) *Jennings* v. *Rundall*, 8 T. R. 335; *Green* v. *Greenbank*, 2 Marsh. 485.

(*p*) Rolle, Abr. 1, 2, Action Sur. Cas. D. 3.

(*q*) *Burnard* v. *Haggis*, 14 C. B. N. S. 45; 32 L. J. C. P. 189.

(*r*) Bac. Abr. INFANTS (T.) 4; *Farnham* v. *Atkins*, 1 Sid. 446; *Holt* v. *Ward*, 2 Str. 937; 2 Barn. 173.

bound and may be sued by the infant, although the latter has incurred no corresponding legal obligation (s). But an infant cannot obtain a decree for a specific performance of a contract against an adult contracting party (t). An infant cannot be compelled to complete a contract for the purchase of an estate; but if he has paid a deposit under such a contract, he cannot recover it back merely because he declines to complete the purchase (u). When an infant has brought an action by his next friend, and has recovered damages which have been received by the solicitor, the money is the money of the infant; and he may sue the solicitor for it (x).

Contracts binding upon infants.—Infants are not rendered absolutely incapable of contracting so as to bind themselves; for "the law, at the same time that it protects their imbecility and indiscretion from injury, enables them to do certain binding acts for their own benefit. They may grant leases when it is manifestly to their interest and advantage that leases should be granted; and they will not be permitted to avoid them when they come of age; for the privilege is given as a *shield*, not as a SWORD, and shall never be turned into an offensive weapon of fraud and injustice" (y). By the 11 Geo. 4 & 1 Will. 4, c. 65, ss. 16 and 17, infants are empowered to grant renewal of leases, and the Court of Chancery may authorise leases to be made of lands belonging to infants for the benefit of the estate. (And see now 44 & 45 Vict. c. 41, ss. 41—43, *ante*, p. 122.) If an infant contracts for necessary repairs to be done to his dwelling-house, he will not be allowed to avail himself of his infancy as an answer to a fair claim for the payment of the price of the work so done (z). By the custom of gavelkind, an infant at the age of fifteen is reckoned at full age to sell his lands, but under great limitations and restrictions, to prevent him being defrauded. And by custom in some places, an infant seised of lands in socage may, at the age of fifteen years, make a lease for years which shall bind him after he comes of age; for the custom makes fifteen his full age for that purpose (a).

Contracts by infants for necessaries.—"If an infant lives with his parent, who provides such apparel as appears to the parent to be proper, so that the child is not left destitute of clothes or other real necessaries of life, the child cannot bind himself to a stranger

(s) *Warwick* v. *Bruce*, 2 M. & S. 205; 6 Taunt. 118; *Forrester's case*, 1 Sid. 41; 1 Keb. 1; *Davis* v. *Manington*, 2 Sid. 109.

(t) *Flight* v. *Bolland*, 4 Russ. 298.

(u) *Wilson* v. *Kearse*, Peake's Ad. Cas. 196.

(x) *Collins* v. *Brook*, 4 H. & N. 276; 28 L. J. Ex. 143; *Ex parte Brocklebank*, 6 Ch. D. 358.

(y) *Zouch* v. *Parsons*, 3 Burr. 1801; *Maddon* v. *White*, 2 T. R. 161; *Allen* v. *Allen*, 2 Dr. & W. 307, 340; *Staton* v. *Brady*, 14 Ir. C. L. 61.

(z) *Smith* v. *Low*, 1 Atk. 489; *Ashfield* v. *Ashfield*, Wm. Jones, 157.

(a) Bac. Abr. INF. A.: Co. Litt. 45 b.

even for what might otherwise be allowed as necessaries" (*b*). If he orders clothes of a tailor, and they are sent to the father's residence, and the latter disapproves of the proceeding, and sends the clothes back, the tailor will have no claim against anybody for the payment of the price of them. He cannot sue the parent, because he has not sanctioned or authorised the contract (*c*); neither can he sue the infant; for, as the latter was provided for in the father's house, he was under no necessity of contracting for the purchase of goods on his own credit. If, however, the parent was aware of the order and of the delivery of the goods, and saw the infant using and wearing the articles, and made no objection thereto, and did not exercise his parental authority and control to prevent further supplies of such articles, this will be strong evidence to show that the father authorised the order to be given, so as to render him responsible as the principal in the transaction, and the real purchaser of the articles through the medium of his child acting as his agent in that behalf (*d*). If an infant is placed at a boarding-school by a parent or guardian, the master has not in general any remedy against the infant, but must resort to those with whom he agreed for the infant's board and instruction (*e*).

What are necessaries.—Infants not residing under the parental roof, and not provided by their parents with the necessaries of life, may bind themselves by contract to pay for their necessary meat, drink, apparel, physic, good teaching, and instruction (*f*). It has been said that an infant may enter into a contract under seal "for his necessary meat and drink, or his necessary apparel, or his fit schooling, and shall not avoid the same" (*g*); but such contracts would at the present day be regarded with suspicion. And a deed to secure the repayment of money advanced for necessaries has been held voidable; although the infant was ordered to pay the money due (*h*). The infant cannot bind himself to the payment of any particular sum for necessaries, or to give any particular price for them; for the law does not leave the determination of the amount to the infant, but intrusts it to the arbitration of a jury (*i*). From the earliest times down to the present the word "necessaries" has not been confined in its strict sense to such articles as are necessary for the support of life, but extended to

(*b*) *Bainbridge* v. *Pickering*, 2 W. Bl. 1325; *Cook* v. *Deaton*, 3 C. & P. 114; *Story* v. *Perry*, 4 *ib.* 526.

(*c*) *Blackburn* v. *Mackey*, 1 C. & P. 1; *Fluck* v. *Tollemache*, *ib.* 5; *Crantz* v. *Gill*, 2 Esp. 472; *Rolfe* v. *Abbott*, 6 C. & P. 286; *Clements* v. *Williams*, 8 *ib.* 58.

(*d*) *Baker* v. *Keen*, 2 Stark. 502; *Nichole* v. *Allen*, 3 C. & P. 36; *Hesketh* v. *Gowing*, 5 Esp. 132; *Law* v. *Wilkin*, 6 Ad. & E. 718; *Mortimore* v. *Wright*, 6 M. & W. 485.

(*e*) *Duncomb* v. *Tickridge*, Aleyn, 94; Bac. Abr. INF. (I.) 1.

(*f*) Bac. Abr. INFANCY (I.); *Cooper* v. *Simmons*, 7 H. & N. 707; 31 L. J. M. C. 138.

(*g*) Perkins, s. 14; *Russel* v. *Lee*, 1 Lev. 86.

(*h*) *Martin* v. *Gale*, 4 Ch. D. 428.

(*i*) Cas. Law & Eq. 185.

articles fit to maintain the particular person in the state, station, and degree in life in which he is (*k*). Thus, an infant may be made liable for the rent of a fit and proper lodging (*l*), also for lace, silks, and wedding garments, suitable for a person of his rank in life (*m*), and for food, clothing, groceries, nursing, attendance, and necessaries furnished to his wife and family and infant children residing with him (*n*), but not for premises hired to carry on trade (*o*).

Things held not to be necessaries.—The question as to what things are, and what things are not, necessaries suitable for an infant who is living away from the parental roof, and supplies his own wants from funds of which he has himself the management, is a mixed question of law and fact, to be determined by the particular circumstances of each case. There are, however, many things which cannot be necessary for the use of an infant under any circumstances, and respecting which no valid contract can be entered into (*p*). Thus, articles of mere luxury cannot be necessaries suitable to the condition of any infant. But articles of utility, although luxurious and expensive, may be; and whether they are so or not is a question for the jury in each particular case, subject to the preliminary question whether there is evidence on which they may reasonably and properly conclude that the articles in question are necessaries (*q*). If the infant be an invalid, and horse or carriage exercise is recommended by a medical man, and is resorted to by the infant for the restoration of his health, it will be considered necessary, and the infant will be bound to pay for it (*r*).

Things which may, or may not, be necessaries according to circumstances.—The infant's clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill, and the extent of his probable means when of age; and the nature and number of his servants and attendants will depend upon his position in society (*s*). Expensive uniforms are necessary for infant officers in the guards (*t*), and the ordinary volunteer regimentals to infant members of a volunteer corps (*u*). Silks, furs, and velvets may be necessary for a young lady of rank

(*k*) *Peters* v. *Fleming*, 6 M. & W. 46.

(*l*) *Kirton* v. *Elliott*, 2 Bulstr. 69; *Evelyn* v. *Chichester*, 3 Burr. 1719.

(*m*) *Rainsford* v. *Fenwick*, Cart. 215; *Dalton* v. *Gib*, 5 Bing. N. C. 198; *Brayshaw* v. *Eaton*, *ib.* 234; 7 Sc. 183.

(*n*) Bacon's Maxim, R. 18, p. 67, ed. 1639; *Chapple* v. *Cooper*, 13 M. & W. 259.

(*o*) *Lowe* v. *Griffith*, 1 Sc. 458; *ante*, p. 122.

(*p*) *Brooker* v. *Scott*, 11 M. & W. 67; *Wharton* v. *Mackenzie*, 5 Q. B. 606; *Burghart* v. *Angerstein*, 6 C. & P. 698; *Charters* v. *Bayntun*, 7 *ib.* 52.

(*q*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; 38 L. J. Ex. 8.

(*r*) Coleridge, J., *Wharton* v. *Mackenzie*, 5 Q. B. 612, 613.

(*s*) Alderson, B., *Chapple* v. *Cooper*, 13 M. & W. 258; *Hands* v. *Slaney*, 8 T. R. 578.

(*t*) *Burghart* v. *Hall*, 4 M. & W. 730.

(*u*) *Coates* v. *Wilson*, 5 Esp. 152.

and station in society, and a gold watch-chain and gold breast-pins for the use of the son of a gentleman of fortune (*x*). A proper marriage settlement also is necessary for a female infant of rank and station about to be married; and she may therefore retain a solicitor to draw it up (*y*). If an infant widower gives directions for the funeral of a deceased wife, he is personally responsible for the expenses thereof; and the same liability arises in the case of an infant widow who has given an order to an undertaker for the burial of a deceased husband, although the latter may have died in insolvent circumstances (*z*).

Infant purchasers of estates and railway shares.—An infant purchaser of real estate, who has taken possession, becomes liable to all the obligations attached to the estate, to pay rent in the case of a lease rendering rent, and to pay a fine due on admission in the case of a copyhold to which the infant has been admitted, unless he has elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so (*a*). An infant who acquires railway shares is in the same situation as an infant acquiring real estate or any other permanent interest. If the infant repudiates the shares during his infancy, or as soon as he comes of age, he is not liable for the payment of calls made during his infancy; but, if there has been no such waiver or repudiation, and he continues to hold the shares after he becomes of age, he is liable for calls made on those shares during infancy, without any act of ratification on his part; and a plea of infancy at the time the calls were made is bad (*b*). A transfer to an infant of shares in a company which becomes insolvent before the infant attains his majority, will be treated as a nullity, and the transferor will remain liable (*c*).

Avoidance of contracts made during infancy.—By the Infants Relief Act, 1874, s. 2, no action (*d*) shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (*e*). This section

(*x*) *Dalton* v. *Gib*, 5 Bing. N. C. 198; *Brayshaw* v. *Eaton*, *ib.* 231; *Ford* v. *Fothergill*, Peake. 301.

(*y*) *Helps* v. *Clayton*, 17 C. B. N. S. 553; 34 L. J. C. P. 1.

(*z*) *Chapple* v. *Cooper*, 13 M. & W. 259.

(*a*) Co. Litt. 2, b.

(*b*) *London & North West. Ry. Co.* v. *M'Michael*, 5 Exch. 123; 20 L. J. Ex. 99; *Newry & Ennis Ry. Co.* v. *Coombe*, 3 Exch. 565; *Dublin & Wick. Ry. Co.* v. *Black*, 8 Exch. 181; *Mitchell's case*, L. R. 9 Eq. 363; 39 L. J. Ch. 199; *Ebbett's case*, L. R. 5 Ch. 302; 39 L. J. Ch. 679.

(*c*) *Capper's case*, L. R. 3 Ch. 458; *Mann's case*, *ib.* 459, n.

(*d*) See a doubt suggested in Dart's Vendors & Purchasers, as to whether the Act applies to *suits* for specific performance.

(*e*) 37 & 38 Vict. c. 62, s. 2.

applies to ratifications, made after the passing of the Act, of contracts entered into before the passing of the Act (*f*). A judgment obtained by default, after majority, upon a bill of exchange given during minority, is a ratification within the Act, and cannot be enforced in bankruptcy (*f*). Where the defendant promised to marry, and afterwards, on coming of age, recognised the promise without expressly making a fresh promise, it was held that the Act applied, and the plaintiff was nonsuited (*g*). "If an infant make a deed, and deliver it within age, and afterwards, upon his coming of full age, deliver it again, yet the deed is void; for the deed must take effect from the first delivery, or not at all." As regards leases, however, if the infant accepts rent from the lessee, and does acts affirmatory of the contract, the lease will *primâ facie* be deemed to have been a necessary and beneficial lease, and will be valid and binding. If, on the other hand, the infant repudiates the contract on his attaining his majority, this will be evidence the other way. Where the obligation is incident to a beneficial interest in property, the obligation cannot be avoided and the interest retained. If an infant lessee remains in possession of property demised to him, and pays rent after he attains his majority, he cannot afterwards repudiate the lease. He becomes chargeable moreover, with all the arrears incurred during his minority; for, though at full age he might have departed from the bargain, and thereby have avoided payment of the arrears which the lessor suffered to accrue during the minority, yet his continuance in possession after his full age ratifies and affirms the contract *ab initio*, and so gives a remedy for the arrears of rent incurred from the time of the contract made (*h*). So an infant who has taken possession of land under a contract of sale, and after coming of age has continued in possession, and exercised acts of ownership, cannot avoid payment of the consideration (*i*).

A person collaterally responsible for an infant cannot avail himself of the infancy of the principal debtor (*k*). And the indorsee of a negotiable instrument may maintain an action against the maker or acceptor, though the indorser is an infant (*l*).

Extortionate contracts with expectant heirs (*m*), by creditors

(*f*) *Ex parte Kibble*, L. R. 10 Ch. 373.

(*g*) *Coxhead* v. *Mullis*, 3 C. P. D. 439; as to what amounts to a fresh promise, however, see *Northcote* v. *Doughty*, 4 C. P. D. 385, and *Ditcham* v. *Worrall*, 5 C. P. D. 410.

(*h*) *Baylis* v. *Dineley*, 3 M. & S. 477; Bac. Abr. Inf. (A.); (K.) 8; *Smith* v. *Low*, 1 Atk. 489; *Ketsey's case*, Cro. Jac. 20; *Kirton* v. *Eliott*, 2 Bulstr. 69.

(*i*) *Henry* v. *Root*, 33 N. Y. 526.

(*k*) *Hartness* v. *Thompson*, 5 John. 160.

(*l*) *Hardy* v. *Waters*, 38 Maine, 450; *Nightingale* v. *Withington*, 15 Mass. 273.

(*m*) The doctrine extends to young people who are supposed to be well off, and where the money is lent in hope of extorting payment from the father, *Neville* v. *Snelling*, 15 Ch. D. 679.

who take advantage of the pecuniary necessities of such heirs will be set aside, and the jurisdiction of the courts is not taken away by the 31 & 32 Vict. c. 4, s. 1, by which no purchase (which by sect. 2, is to include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired), made *bonâ fide* and without fraud or unfair dealing (*n*) of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue (*o*).

Contracts with young persons: undue influence.—The courts will prevent young persons, subject to undue influence, from entering into imprudent contracts without proper advice, and in respect of which they cannot appreciate the bearings (*p*), and a volunteer or any person with notice taking an assignment of such contract will be liable to have the same set aside (*q*).

Of the obligation of parents to provide for their children.—By the common law, a father who gives no authority to another, and enters into no contract, is no more liable for goods supplied to his child than a brother, or an uncle, or a mere stranger would be. "In order to bind a father in point of law for a debt incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person" (*r*); but the 43 Eliz. c. 2, s. 7, for the relief of the poor, provides that the father and grandfather, and mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges, relieve and maintain every such poor person; and the 4 & 5 Wm. 4, c. 76, s. 56, provides, that all parish relief given to the wife or to a child under the age of sixteen, not being blind, or deaf, or dumb, shall be considered as given to the husband or parent, as the case may be, and may be treated (s. 58) as a loan to the latter, and may be recovered in the mode thereby appointed (s. 59). A child left to starve, therefore, must apply to the parish, and the parish will compel payment of subsistence-money from the parent (*s*).

(*n*) Which means an unconscientious use of the power arising out of the circumstances and condition of the parties, *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484, 491; *Beynon* v. *Cook*, L. R. 10 Ch. 389.

(*o*) *Miller* v. *Cook*, L. R. 10 Eq. 641; *Tyler* v. *Yates*, L. R. 11 Eq. 265; *ib.* 6 Ch. 665; 40 L. J. Ch. 11, 768; see however *O'Rourke* v. *Bolingbroke*, 2 Ap. Cas. 814, as to the effect of the statute, *per* Ld. Blackburn; see also *Beynon* v. *Cook*, L. R. 10 Ch. 385; *In re Slater's Trust*, 11 Ch. D. 227.

(*p*) *Kempson* v. *Ashbee*, L. R. 10 Ch. 15.

(*q*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188.

(*r*) Ld. Abinger, *Mortimore* v. *Wright*, 6 M. & W. 487; see *Ruttinger* v. *Temple*, 33 L. J. Q. B. 1; 4 B. & S. 491; where the child is living with its mother, under an order of the Court of Chancery, see *Bazeley* v. *Forder*, L. R. 3 Q. B. 559.

(*s*) *Skelton* v. *Springett*, 11 C. B. 452; see The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 14.

Contracts with executors.—An executor may sell or pledge the assets of the testator (*t*), and may also sell part of the assets at a fixed price to a creditor of the testator to clear the debt (*u*). He has, in fact, complete and absolute control over the property of the testator (*x*), notwithstanding it may be affected with some peculiar trust or equity in his hands; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator to which his property is legally liable before all other claims. But, if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside (*y*). Thus, if a creditor of the executor buys or receives in pledge any part of the personal assets, not for money advanced at the time, but in satisfaction of his debt, he is, generally speaking, a party to the breach of trust by the executor, because this sale or pledging is *primâ facie* inconsistent with the duty of an executor (*z*).

If an executor or administrator takes a bond or contract under seal in his representative character, this is an obligation strictly personal to himself, upon which he can recover only in his own right. But, if the personal representatives, in the course of their administration, have themselves entered into simple contracts upon which a right of action has accrued, and the money when recovered would be assets, they may sue in their representative capacity (*a*). Thus, where executors carry on the business of their testator, the money recovered by them upon contracts effected in carrying on the business will be assets in their hands, and they may therefore sue for it in their representative capacity (*b*), and it makes no difference that the materials supplied under the contract never belonged to the testator (*c*). They may also maintain an action in their representative character upon all negotiable securities which have been indorsed or made payable to them as executors or administrators, or generally, or individually, if the amount when recovered will be assets in their hands. If, by mistake, they pay away the money, or if they sell the goods, of their testator, or carry on his business for the benefit of his personal estate and for the purpose of winding up his affairs, and enter into contracts in so doing, they may sue either in their representative capacity, or in their individual character, not naming themselves

(*t*) *Scott* v. *Tyler*, 2 Dick. 712, 725.
(*u*) *Hepworth* v. *Heslop*, 6 Hare, 561.
(*x*) *Earl Vane* v. *Rigden*, L. R. 5 Ch. 663; *Bassett* v. *Nosworthy*, 2 W. & T. Lead. Cas. Eq., 2nd. ed., p. 1, *et seq.*; see however *Oceanic Steam Nav. Co.* v. *Sutherberry*, 16 Ch. D. 236.
(*y*) *Elliot* v. *Merryman*, 1 W. & T.; Lead. Cas. in Eq., 2nd ed., p. 45, *et seq.*
(*z*) *Keane* v. *Robarts*, 4 Mad. 357.
(*a*) *Heath* v. *Chilton*, 12 M. & W. 637; 13 L. J. Ex. 228.
(*b*) *Moseley* v. *Rendell*, L. R. 6 Q. B. 388; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346, explaining *Bolingbroke* v. *Kerr*, L. R. 1 Ex. 222; 35 L. J. Ex. 137.
(*c*) *Abbott* v. *Parfitt*, *supra*.

executors (*d*). They should, however, upon such contracts, sue in their representative capacity, in order to protect the assets from a set-off in respect of their individual debts (*e*). The title of an administrator to the effects and personal estate of the deceased, though it does not exist until the grant of administration, relates back to the time of the death, so as to entitle the administrator to sue upon an implied contract of sale in respect of goods delivered to and received by a party before the grant of the letters of administration. And, if an agent sells goods in ignorance of the death of the principal, the administrator may adopt the contract, and sue upon it in his representative character as soon as he has obtained letters of administration (*f*).

Interest of executors or administrators.—As the executors unitedly represent the person of the testator, they are all jointly interested in contracts entered into with the deceased, although some of them be infants under the age of seventeen years (*g*), unless they have renounced probate, in which case the right of representation devolves upon the others, just as if the parties making the renunciation had never been appointed executors (*h*). But two of three co-executors may recover lands of their testator in ejectment on a joint demise by the two (*i*). In contracts which have been entered into with the personal representatives themselves in the course of their administration, all are jointly interested if the contract has been made on behalf of all; but where three out of four executors undertook the management of the testator's concerns, and possessed themselves of his property, and directed an auctioneer to sell certain portions of the estate, and sued for the price without joining the fourth, it was held that the action was well brought by the three who had authorised the sale, and were the actual parties to the contract (*k*).

Liabilities of executors and administrators on their own contracts.—We have already seen that a promise by an executor to pay a debt due from his testator will not make him personally liable *de bonis propriis*, unless there be some new and valid consideration for the promise. He is chargeable only thereon in his representative character to the extent of the assets in his hands, although the promise has been put into writing and signed by him, pursuant to the statute of frauds (*l*). But, if the executor binds himself by deed, without any fresh consideration, or if he gives a

(*d*) *Aspinall* v. *Wake*, 3 M. & Sc. 423; 10 Bing. 51; *Grissell* v. *Robinson*, 3 Sc. 335; *Vanquelin* v. *Bouard*, 33 L. J. C. P. 78; 15 C. B. N. S. 341.

(*e*) *Clark* v. *Hougham*, 2 B. & C. 155.

(*f*) *Foster* v. *Bates*, 12 M. & W. 226; *Welchman* v. *Sturgis*, 13 Q. B. 555; *Bodger* v. *Arch*, 10 Exch. 340.

(*g*) *Foxwist* v. *Tremaine*, 2 Saund. 212.

(*h*) 20 & 21 Vict. c. 77, s. 79.

(*i*) *Doe* v. *Wheeler*, 15 M. & W. 623.

(*k*) *Brassington* v. *Ault*, 9 Moore, 343.

(*l*) *Nelson* v. *Serle*, 4 M. & W. 795; 2 Wms. Saund. 137, n. (a.); *Hamilton* v. *Terry*, 21 L. J. C. P. 132.

written undertaking or promise to pay the debt, founded on a new and valid consideration, such as the payment of money, the supply of goods, or the delivery of documents and evidences of title which the creditor has a right to retain, he will then be personally liable *de bonis propriis* upon the contract (*m*). If the executor signs his name to a written undertaking to pay a debt due to a creditor of the deceased, in consideration that such creditor will give him time for payment, he will be personally responsible *de bonis propriis* upon this contract (*n*). And, if an executor gives a written undertaking signed by him to a legatee, promising to pay a legacy bequeathed to the latter in consideration that the legatee will forbear for a certain time from taking proceedings to obtain payment of the legacy, he will render himself personally responsible for the payment of the legacy, as being then a debt due from him to the legatee (*o*).

If an executor signs a promissory note as executor, whereby he promises to pay a sum of money with interest to the promisee, he cannot escape from his liability for the payment of the money to the latter by showing that the amount promised to be paid was a debt due from his testator, or that it was a legacy bequeathed to the promisee, and that he, the executor, has fully administered, &c.; for the giving of such a security by the personal representative to the creditor or legatee imports an agreement for forbearance, and binds him individually, and supersedes the necessity of proving assets (*p*). If executors have effected a policy of insurance to insure the estate against loss, they will be responsible if they allow the policy to drop without consulting the parties beneficially interested, or resorting to the Court (*q*). If they give orders for the funeral of their deceased testator, or adopt or sanction the acts of those who have given such orders, they will themselves be personally responsible *de bonis propriis* to the parties who have fulfilled the orders (*r*). If the executor continues the trade of the testator, he will of course be personally responsible *de bonis propriis* upon all contracts entered into by him in carrying on such trade, although he receives no part of the profits and acts strictly as trustee (*s*); and, by the law of England, executors and trustees taking shares in joint-stock companies make themselves personally liable as partners, even though they describe

(*m*) *Wheeler* v. *Collier*, Cro. Eliz. 406; *Hamilton* v. *Incledon*, 4 Bro. P. C. 4.

(*n*) *Johnson* v. *Whitechott*, 1 Roll. Abr. 24; *Hawes* v. *Smith*, 2 Lev. 122; *Fish* v. *Richardson*, Yelv. 55; *Bradly* v. *Heath*, 3 Sim. 543.

(*o*) *Davis* v. *Reyner*, 2 Lev. 3; 1 Ventr. 120; 2 Wms. Saund. 137, n. (d).

(*p*) *Childs* v. *Monins*, 5 Moore, 282; 2 B. & B. 460; *Barnard* v. *Pumfret*, 5 Myl. & Cr. 71; *Ridout* v. *Bristow*, 1 Cr. & J. 231.

(*q*) *Garner* v. *Moore*, 24 L. J. Ch. 687; 22 & 23 Vict. c. 35, s. 30.

(*r*) *Brice* v. *Wilson*, 3 N. & M. 512; 8 Ad. & E. 349, n. (c.).

(*s*) *Whitman* v. *Townroe*, 1 M. & S. 412; *Ex parte Garland*, 10 Ves. 119.

themselves as trustees; and they are deemed to have intended to bind themselves absolutely; for, if it were held that persons entering into contracts with a trustee were really contracting, not with the individual, but with the trust estate, it would be necessary to examine beforehand the state and amount of the trust estate, and the powers of the trustee; and it could not afterwards be dealt with or disposed of until the consequences of the contract were ascertained (*t*). If an executor, after the death of the testator, borrows money, although for the purposes of the estate, he is only liable personally, and the lender cannot prove against the estate (*u*). But, when there is a promise by an executor, founded upon a previous contract made by the testator, the executor may be sued in his representative character so as to charge the assets (*x*). So he may be sued in his representative capacity for money paid to his use, but only when the matter arises out of a contract with or something done by the testator (*y*).

Liability of executors and administrators for the acts of each other.—Upon contracts that have been entered into by the personal representatives themselves in the course of their administration they are jointly liable, if they are jointly parties to the contract, or if one of them has contracted as a recognised or authorised agent on behalf of all; but one executor has no implied authority to bind his co-executors for anything beyond the reasonable and necessary expenses for the funeral of the deceased. An infant executor is not liable upon contracts made by the personal representatives themselves in the course of their administration.

Rights of the husband upon contracts made with the wife during coverture (*yy*).—By the common law the husband is entitled to the benefit of all contracts executed by the wife, and of all executory contracts made by her without his knowledge but for his benefit (*z*). In some cases the husband is solely entitled to the benefit of the wife's contracts, in others he may elect to give her an interest by joining her as a co-plaintiff in any action brought to enforce them. At common law in the case of all simple contracts made with the wife, except bills of exchange and promissory notes, the husband alone took the benefit, unless there was an express promise made to the wife, and unless the consideration upon which the promise was founded moved from her (*a*); for, if the wife

(*t*) *Lumsden* v. *Buchanan*, 4 Macq. H. L. Cas. 950; *Muir* v. *City of Glasgow Bank*, 4 Ap. Cas. 337; *Cunninghame* v. *City of Glasgow Bank*, 4 Ap. Cas. 607; *Cree* v. *Somerville*, 4 Ap. Cas. 648; *Gillespie* v. *City of Glasgow Bank*, 4 Ap. Cas. 632.

(*u*) *Farhall* v. *Farhall*, L. R. 7 Ch. 123.

(*x*) *Dowse* v. *Cox*, 3 Bing. 20; *Farhall* v. *Farhall*, *supra*; *Powell* v. *Graham*, 7 Taunt. 581.

(*y*) *Farhall* v. *Farhall*, L. R. 7 Ch. 123, 128.

(*yy*) With respect to the rights and liabilities of husband and wife, reference must now be made to the Married Women's Property Act, 1882, which will be found in the Appendix to this volume.

(*z*) *Millard* v. *Harvey*, 34 Beav. 237.

(*a*) *Buckley* v. *Collier*, 1 Salk. 114.

rendered services without any express promise of remuneration having been made to her, the husband alone was entitled to the benefit of the contract, because he was entitled to the fruits of her labour (b); and, where the personal skill of the wife did not alone form the consideration for the promise, but materials were provided which were the property of the husband, he alone could enforce the contract (c). Thus, where a husband and wife sued jointly to recover money lent by the wife, and the declaration stated a promise to them to repay the money, and alleged a breach by non-payment *ad damnum eorum*, it was held that they could not maintain a joint action, as a *feme covert* could not be possessed of money jointly with her husband (d). So, where an action was brought by husband and wife for the use and occupation of a messuage and lands, for money had and received to the use of the husband and wife, and for money due on accounts stated between them and the plaintiff, stating the promises and laying the damages to them jointly, it was held, in arrest of judgment, that the entire damage resulted to the husband, and that the action ought to have been brought in his name alone (e).

In the case of bills and notes made payable to the wife during the coverture, the husband may take the sole benefit (*f*), or he may at his option give his wife an interest therein by joining her with him as a co-plaintiff (*g*). And the law is the same in the case of bonds and other personal contracts under seal entered into during the coverture with the wife separately, or with the husband and wife jointly (*h*). The wife, indeed, may sue alone and recover upon a contract under seal made with her during coverture, if the coverture is not pleaded (*i*). And, where a married woman brought an action of debt on simple contract in her own name against a railway company for dividends due on shares standing in her name, it was held that she was entitled to recover, the non-joinder of the husband not having been pleaded in abatement (*k*).

Rights of the surviving wife.—If the wife survives the husband, she is entitled to the benefit of all contracts under seal entered into during the coverture with herself alone, or with her husband and herself jointly (*l*), but she may waive her right to

(*b*) *Brashford* v. *Buckingham*, Cro. Jac. 77, 205; *Fountain* v. *Smith*, 2 Sid. 128; Roll. Abr. 32, pl. 12.

(*c*) *Holmes* v. *Wood*, 1 Barn. 75, 249.

(*d*) *Abbot* v. *Blofield*, Cro. Jac. 644; *King* v. *Bassingham*, 8 Mod. 199.

(*e*) *Bidgood* v. *Way*, 2 W. Bl. 1236; *Johnson* v. *Lucas*, 1 Ell. & Bl. 659; 22 L. J. Q. B. 174; *Bond* v. *Maze*, 16 L. J. Q. B. 196.

(*f*) *Burrough* v. *Moss*, 10 B. & C. 558.

(*g*) *Phillis Kirk* v. *Pluckwell*, 2 M. & S. 393.

(*h*) *Howell* v. *Maine*, cited 2 M. & S. 396; *Ankerstein* v. *Clarke*, 4 T. R. 616; *Arnold* v. *Revoult*, 4 Moore, 71; 1 B. & B. 443; *Hellyer* v. *Grace*, Styles, 9.

(*i*) *Bendix* v. *Wakeman*, 12 M. & W. 97; *Guyard* v. *Sutton*, 3 C. B. 153.

(*k*) *Dalton* v. *Mid. Ry. Co.*, 13 C. B. 474; 22 L. J. C. P. 177.

(*l*) 1 Roll. Abr. 349 (B.); *Coppin* v. ——, 2 P. W. 496.

the instrument; and it then becomes the obligation of the husband alone. To a debt due on a joint judgment recovered by herself and husband during the coverture, the wife is also entitled by survivorship (*m*). The surviving wife is entitled also to all promissory notes and bills of exchange made payable to her during the coverture, and to all express simple contracts where the promise has been made to herself during the marriage, and the consideration to support it has moved from her (*n*). Where a *feme covert* administratrix received a sum of money in that character, and lent the same to her husband, taking in return for it the joint and several promissory notes of her husband and two other persons payable to her with interest, and the husband died, it was held that the note was a *chose in action* surviving to the wife (*o*). As regards a simple contract, however, made with the wife alone, or with the husband and wife jointly during coverture, the husband may elect to let his wife have the benefit of it by survivorship, or he may take it himself. If, in his lifetime, he brings an action upon the contract in his own name, that amounts to an election to appropriate it to himself, and the wife cannot consequently, in this case, take it by survivorship (*p*). If he joins his wife as a party suing on the contract and dies, she may, by entering a suggestion of his death upon the record, prosecute the suit to judgment for her own sole use; and, even if judgment has been signed in the action so commenced prior to the husband's death, but no execution has been levied, the benefit of the judgment will survive to the wife, and she may forthwith issue execution thereon for her own use (*q*).

The common law rights of the husband to the benefit of contracts made by the wife during coverture have, however, been modified by the 33 & 34 Vict. c. 93, which enables a married woman to maintain an action in her own name for the recovery of any wages or earnings acquired or gained by her after the passing of the Act, in any employment, occupation, or trade, in which [illegible] is engaged, or which she carries on separately from her husba[illegible], or for any money or property acquired by her through the exercise of any literary, artistic, or scientific skill; and such wages, earnings, money, and property, and all investments thereof, are to be deemed and taken to be property settled to her separate use, independent of any husband to whom she may be married; and

(*m*) Com. Dig. Bar. et Feme, F. 1; *Oglander* v. *Baston*, 1 Vern. 396.

(*n*) *Nash* v. *Nash*, 2 Mad. 133; *Gaters* v. *Madeley*, 6 M. & W. 423; *Fleet* v. *Perrins*, L. R. 4 Q. B. 500.

(*o*) *Richards* v. *Richards*, 2 B. & Ad. 447.

(*p*) *Scarpellini* v. *Atcheson*, 7 Q. B. 864.

(*q*) *Sherrington* v. *Yates*, 12 M. & W. 865; *Bond* v. *Simmons*, 3 Atk. 21; *Nanney* v. *Martin*, 1 Ch. C. 27.

(*r*) See *Lovell* v. *Newton*, 4 C. P. D. 7; *Ashworth* v. *Outram*, 5 Ch. D. 923.

her receipts alone will be a good discharge for such wages, earnings, money, and property (s).

Under this enactment a married woman can maintain an action against her bankers for dishonouring her cheque, or for not presenting for payment a bill of exchange deposited with them for that purpose, or for not giving her notice of the dishonour of a bill of exchange entrusted by her to them (t).

The statute gives a right to bring an action, and says that the married woman shall have the same remedies as a *feme sole;* it may be doubted whether like a *feme sole* she would be barred by the Statute of Limitations, or would come within the exceptions as a *feme covert* (u).

Inability of married women to bind themselves or their husbands by deed.—The husband cannot be sued upon any contract under seal entered into and executed by the wife in his name or on his behalf, unless he has given her a power of attorney under seal to contract for him by deed, or unless the deed is sealed and delivered by her in his name, in his presence, and by his commandment. Neither is the wife herself liable upon the deed by reason of her coverture (x). But, if work has been performed, or services rendered, or goods supplied for the use of the husband upon the faith of a covenant by the wife for payment or remuneration, the husband is liable for the fair value of the work and services, and of the goods supplied, just as if the covenant had never been in existence (y).

Authority of the wife to sign writings for the husband.—The liability of the husband upon simple contracts made or signed by the wife during the coverture depends upon the nature of such contracts, and of the things stipulated and agreed to be done. No power of attorney is requisite to enable the wife to bind the husband by simple contract; but the latter will be held liable, provided he appears to have expressly or impliedly sanctioned what she has done (z). The wife is not the agent of the husband in respect of the management of his estate and business (a), unless he has intrusted her with the general management of it, in which case he makes her his general agent for the carrying it on, and clothes her with an implied authority to enter into all such contracts and agreements as are usual and necessary for the purpose;

(s) 33 & 34 Vict. c. 93, ss. 1 & 11.

(t) *Summers* v. *City Bank*, L. R. 9 C. P. 580.

(u) See *post*, p. 1252.

(x) *Lambert* v. *Atkins*, 2 Campb. 273; Cod. lib. 4, tit. 12, lex. 1; as to renewals of leases by a *feme covert*, see 11 Geo. 4 & 1 W. 4, c. 65, s. 16.

(y) *White* v. *Cuyler*, 1 Esp. 200; 6 T. R. 176. By the 37 & 38 Vict. c. 78, s. 6, a married woman who is a bare trustee may convey or surrender freehold or copyhold as if she were a *feme sole*. A verbal agreement by a wife to convey lands to her husband will not bar the heir-at-law. See *Williams* v. *Walker*, 9 Q. B. D. 576.

(z) *M'George* v. *Egan*, 7 Sc. 112.

(a) *Meredith* v. *Footner*, 11 M. & W. 202.

and he is consequently responsible for the fulfilment of all contracts that may be entered into by her in the execution of her task, just as if they had been made by any ordinary general agent employed by him in the matter (*b*). Bills of exchange and promissory notes, for example, drawn, accepted, or indorsed by a wife, who is intrusted by the husband with the conduct and management of a business in the carrying on of which it is usual to negotiate such securities, are binding upon the husband; but, if she is not carrying on the husband's business, it must be shown that she acted by his express authority (*c*). The wife may be clothed with an express or implied authority to bind the husband by signing her own name as well as the husband's name; and the husband may accept bills and contract in his wife's name as well as in his own name (*d*). A wife who has the conduct of her husband's business, and who is in the habit of drawing, accepting, and indorsing bills and notes in his name, may draw and indorse by the hand of her daughter (the daughter being in her presence and acting under her immediate direction) without violating the rule *delegatus non potest delegare* (*e*). The husband is not liable for any fraud of the wife which is directly connected with and dependent upon a contract (*f*).

Loans of money to the wife.—A married woman has in general no implied authority to borrow money and charge the husband with the repayment of it (*g*). But such small amounts as a wife may require upon an emergency for her household expenses, medicines, or necessaries, a third party would be justified in lending her (*h*); and a person who has advanced money to the wife for necessaries may be entitled to stand in the place of the person who actually supplied the necessaries (*i*).

Sale of goods to married women.—Every married woman residing with her husband, and having the general management of his house and household affairs, is presumed to be his general agent in all matters connected with the domestic economy of the house and family. She is, therefore, clothed with an implied authority from the husband to give orders for wearing apparel, furniture, provisions, and all such things as may fairly be presumed necessary for the decent maintenance of herself, her husband, and family, and the general comfort and enjoyment of the household, according to the apparent circumstances and situation in life of her husband and the position in society which he allows her to

(*b*) *Petty* v. *Anderson*, 10 Moore, 577.

(*c*) *Prestwick* v. *Marshall*, 5 M. & P. 513. 7 Bing. 565; *Coles* v. *Davis*, 1 Campb. 485; Code Nap. L. 1, tit. 5, c. 6, 220

(*d*) *Lindus* v. *Bradwell*, 5 C. B. 583; 17 L. J. C. P. 123.

(*e*) *Lord* v. *Hall*, 8 C. B. 631.

(*f*) *Wright* v. *Leonard*, 11 C. B. N. S. 258. 30 L. J. C. P. 365.

(*g*) *Knox* v. *Bushell*, 3 C. B. N. S. 335.

(*h*) *Harris* v. *Lee*, 1 P. Wms. 482.

(*i*) *Jenner* v. *Morris*, 29 L. J. Ch. 923; *Davidson* v. *Wood*, 1 De G. J. & S. 465; 32 L. J. Ch. 400.

assume (*k*). But a wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live (*l*). And this presumption of the wife's authority may be rebutted by proof that the husband had furnished her with ready money to pay for what was necessary, and had forbidden her to pledge his credit (*m*), or that the wife had, during the husband's absence and without his knowledge, placed herself under the protection of a man with whom she was living in adulterous intercourse (*n*). The implied authority however, to bind the husband, resulting from cohabitation, "may be discharged by the prohibition and countermand of the husband" (*o*). The wife has no implied authority to run into extravagance, and to give orders which are beyond the husband's means. If, therefore, wines and spirits, or extravagantly expensive dresses, expensive music, jewels, and articles of luxury and ornament are ordered by the wife, there must be reasonable evidence to show that the wife has made the contract with the knowledge and assent of the husband (*p*). If a tradesman finds a wife giving extravagant orders, unsuited to the husband's estate and apparent condition of life, he ought, if he intends to look to the husband for payment, to ascertain whether the latter is aware of the wife's extravagance, and whether he does or does not sanction it (*q*). Where a married lady went to a watering-place without her husband, and ordered expensive articles of dress unsuited to her husband's circumstances, and the latter disapproved of her extravagance as soon as he was aware of it, it was held that he was not responsible for the price of the things supplied to her (*r*). If a married woman obtains silks on credit and pawns them, the husband is not bound to pay for them, as they never came to his use; but it is otherwise, if they are made up and sent home and worn by the wife in his presence (*s*).

Proof of the assent of the husband to the wife's contracts.— But the law, whilst discouraging the covert pandering of tradesmen to the extravagance of married women, expects from the

(*k*) *Etherington* v. *Parrot*, 1 Salk. 118; *Waithman* v. *Wakefield*, 1 Campb 120; *Clifford* v. *Laton*, 3 C. & P. 16; Byles, J., *Jolly* v. *Rees*, 15 C. B. N. S. 643; 33 L. J. C. P. 177.

(*l*) *Phillipson* v. *Hayter*, L. R. 6 C. P. 38; 40 L. J. C. P. 14; *Debenham* v. *Mellon*, 5 Q. B. D. 394, C. A.; 6 Ap. Cas. 24.

(*m*) *Jolly* v. *Rees*, and *Debenham* v. *Mellon*, *supra*.

(*n*) *Atkyns* v. *Pearce*, 2 C. B. N. S. 763; 26 L. J. C. P. 252.

(*o*) *Manby* v. *Scott*, Bridg. Judg. by Bennett, 229; 1 Bac. Abr. 717; 2 Smith's L. C. 375, 5th edit.; *Jolly* v. *Rees*, and *Debenham* v. *Mellon* *supra*.

(*p*) *Metcalfe* v. *Shaw*, 3 Campb 22; *Spreadbury* v. *Chapman*, 8 C. & P. 371; *Reneaux* v. *Teakle*, 8 Exch. 680; *Reid* v. *Teakle*, 13 C. B. 627; 22 L. J. C. P. 161.

(*q*) *Montague* v. *Benedict*, 3 B. & C. 631, *Lane* v. *Ironmonger*, 13 M. & W. 369; *Seaton* v. *Benedict*, 2 M. & P. 66; 5 Bing 28.

(*r*) *Atkins* v. *Curwood*, 7 C. & P. 756.

(*s*) *Etherington* v. *Parrot*, 1 Salk. 118.

husband some exercise of his marital control for the purpose of checking such extravagance when he has the power of interference and prevention. When, therefore, a husband living under the same roof with his wife sees her attired in costly dresses and indulging in expensive ornaments, and fails to manifest his disapprobation by any active interference or opposition, making no inquiry as to where the articles come from, and giving no intimation to the tradesmen who supply them of his intention not to pay for them, he will be presumed to assent to the wife's acts and proceedings in accordance with the maxim *qui non prohibere potest assentire videtur* (*t*). "If the husband," observes Lord Ellenborough, "has any control over goods improvidently ordered by the wife, so as to have it in his power to return them to the vendor, and he does not return them or cause them to be returned, he adopts his wife's act, and renders himself answerable. Nor is it any excuse in law that the wife is unmanágeable and disobedient, as he must be supposed to exercise his marital rights and to regulate her conduct." Where, therefore, the goods have not been eloigned, but are in the house with the knowledge and sanction of the husband, it is his duty to compel their re-delivery to the tradesman, or to tender them back to him (*u*). The mere circumstance, however, of the husband seeing the wife wearing some of the things ordered by her, and not objecting to them, will be no proof of his assent to the whole of an extravagant order. The fact that the wife has ordered goods of a similar description from the tradesman with the assent of the husband would be evidence that she had the husband's authority to deal with him (*x*).

Of the giving of credit to married women, so as to exempt the husband from liability.—Evidence that the wife has a separate income over which the husband has no control, that she keeps a separate banking account of her own, and that the plaintiff has taken the wife's promissory notes, or has drawn bills of exchange on her which she has accepted in her own name, in payment of goods supplied to her, and which notes or bills have been paid when at maturity through her bankers, shows that the plaintiff dealt exclusively with the wife, and gave credit to her relying upon the funds known or presumed to be at her disposal, so as to exempt the husband from responsibility (*y*). In these cases the remedy of the creditor is against the separate property of the wife in the

(*t*) Parke, B., *Morgan* v. *Thomas*, 8 Exch. 307; 2 Instit. 305, a.; *Morton* v. *Withers*, Skin. 348.

(*u*) *Waithman* v. *Wakefield*, 1 Campb. 121.

(*x*) *Per* Thesiger, L. J., in *Debenham* v. *Mellon*, 5 Q. B. D. 403; see also 6 App. Cas. 24.

(*y*) *Bently* v. *Griffin*, 5 Taunt. 356; *Freestone* v. *Butcher*, 9 C. & P. 643; *Taylor* v. *Brittan*, 1 C. & P. 16, n.; *Metcalfe* v. *Shaw*, 3 Campb. 22.

hands of her trustees (z). If the tradesman, at the time he deals with and trusts the wife, does not know her to be a married woman, he cannot be said to have given credit to the husband; and, if articles sold to the wife under such circumstances are not necessary for the use of the wife, and have not been used by the wife with the knowledge of the husband, and have not been consumed in the husband's household, or come in any shape or way to his use, and he has not subsequently sanctioned or adopted the wife's contract, he cannot be made responsible for the payment of the price of them (a).

Remedies of creditors against the separate property of married women.—A married woman is incapable of binding herself by a contract; and the fact that a married woman is living apart from her husband, and trading on her own account, does not enable her to contract so as to give a right of action against herself (b). A married woman is not personally liable upon any contract made by her during coverture, whether she be living with, or separated from, her husband, and whether the latter be an alien resident here, or, being a subject, has abjured the realm and gone beyond sea, and she has represented herself to be, and has contracted as, a widow or a *feme sole* (c). But if the wife of an alien who has never been in England has contracted as a *feme sole* she is personally liable (d). A married woman is not liable to the bankrupt law, even though she has separate estate, and has contracted debts after marriage (e). In order that a creditor may obtain payment out of her separate estate he must join as defendants her husband (f) and the trustees of her settlement (g). But, if a married woman has the power of dealing with separate property of her own, she has the power of contracting debts to be paid out of it, and her separate property is bound by her debts, obligations and engagements contracted with reference to and upon the faith or credit of that property (h); and effect will be given to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied (i). It seems to have been thought that a married woman

(z) *Infra*; *Latouche* v. *Latouche*, 34 L. J. Ex 85.

(a) *Clifford* v. *Laton*, 1 M. & M. 102.

(b) *Clayton* v. *Adams*, 7 T. R. 605; *Marshall* v. *Rutton*, 8 T. R. 545.

(c) *Stretton* v. *Busnach*, 1 Bing. N. C. 139; *Barden* v. *Keverberg*, 2 M. & W. 61; *March* v. *Hutchinson*, 2 B. & P. 226; *Williamson* v. *Dawes*, 9 Bing. 292.

(d) *De Gaillon* v. *L'Aigle*, 1 Bos. & P. 357.

(e) *Ex parte Jones*, 12 Ch. D. 484.

(f) *Hancock* v. *Lablache*, 3 C. P. D. 197.

(g) *Attwood* v. *Chichester*, 3 Q. B. D. 722.

(h) *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; 30 L. J. Ch. 298; *Picard* v. *Hine*, L. R. 5 Ch. 276; *London Chartered Bank of Australia* v. *Lempriere*, L. R. 4 P. C. 572; *Mayd* v. *Field*, 3 Ch. D. 587; *Godfrey* v. *Harben*, 13 Ch. D. 216; as to this case, see *Pike* v. *Fitzgibbon*, *infra*; *per* Cotton, L. J., *Davies* v. *Jenkins*, 6 Ch. D. 728.

(i) *Owens* v. *Dickenson*, 1 Cr. & Ph. 54; *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; 30 L. J. Ch. 306.

might charge her separate property in expectancy, and even that she might charge whatever property might subsequently become her separate property (*k*); but it has now been decided that she cannot charge property in respect of which she is restrained from anticipation (*l*), and that she can only charge such separate property as she is possessed of at the time of contracting the debt (*m*). The manner of coming at the separate property of the wife has been by decree, to bind the trustees as to personal estate in their hands (*n*), not by judgment against the wife personally (*nn*). The Court has decreed payment out of a wife's separate estate of notes and bills made and accepted by the husband and wife jointly, or by the wife alone during the coverture (*o*); also of the bills of her tradesmen and solicitors (*p*), and of debts due for rent of houses taken by her on lease (*q*). A married woman may also be placed upon the list of contributories to a company in respect of her separate estate; for, if a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable, and the question whether the obligation was contracted in the manner mentioned must depend upon the facts and circumstances of each particular case (*r*). But the contract must be entered into on the credit of the separate estate; for the separate estate of a married woman is not liable to pay her general debts, even where it is hers absolutely (*s*). A charge on the separate estate is, however, implied where any debt of hers is secured by writing; for otherwise the writing would be a mere piece of waste paper (*s*). If the engagement is not in writing, it must be proved that it was entered into with an intention on the part of the married woman of making her separate estate liable to discharge that debt; and this intention will not be inferred from the mere circumstance of

(*k*) See *Flower* v. *Buller*, 15 Ch. D. 665, following *Pike* v. *Fitzgibbon*, 14 Ch. D. 837, see *infra*.

(*l*) *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, C. A. See *Durrant* v. *Rickets*, *infra*. The Court may charge her estate with her consent, see 44 & 45 Vict. c. 41, s. 39; *Hodges* v. *Hodges*, 20 Ch. D. 749.

(*m*) *Ib.*

(*n*) *Hulme* v. *Tenant*, 1 Br. Ch. C. 19; *Heatley* v. *Thomas*, 15 Ves. 596.

(*nn*) *Durrant* v. *Rickets*, 8 Q. B. D. 177.

(*o*) *Bullpin* v. *Clarke*, 17 Ves. 365; *Stuart* v. *Kirkwall*, 3 Mad. 387.

(*p*) *Murray* v. *Barlee*, 4 Sim. 82.

(*q*) *Gaston* v. *Frankum*, 13 Jur. 39.

(*r*) *Matthewman's case*, L. R. 3 Eq. 781; 36 L. J. Ch. 90; *Butler* v. *Cumpston*, L. R. 7 Eq. 16; 38 L. J. Ch. 35; *M'Henry* v. *Davies*, L. R. 10 Eq. 88; 39 L. J. Ch. 866.

(*s*) *Shattort* v. *Shattort*, L. R. 2 Eq. 182.

her contracting the debt. If, however, the separate property consists of real estate only, the Statute of Frauds will apply, and a writing will be necessary (*ss*). If it appears that a bond or promissory note, or any security for money, or any acknowledgment of a debt, has been obtained from a married woman by any undue influence on the part of the husband, the court would then decline to interfere to charge her separate estate; but the exercise of such undue influence must be clearly established to repel the *primâ facie* liability (*t*). The rule that a *feme covert* is to be considered a *feme sole* as to her separate property, does not extend to transactions between herself and her husband (*u*).

Proof of marriage.—If parties have lived together as man and wife, and are commonly reputed to be married, this suffices to enable third parties to charge them with the duties and responsibilities that result from such a relationship (*x*); and, if it be proved that they have actually gone through the marriage ceremony, but that they afterwards separated, there is sufficient evidence of their standing towards each other in the relationship of man and wife, unless a divorce can be proved. No contract entered into by a married woman with a person who knows her to be married, otherwise than by deed acknowledged, or by some act in court in which she is put at arm's length from her husband, can bind her real estate, even although she has for a long time led the other party to believe that she will abide by such contract, and he has, on the faith of such belief, irrevocably abandoned valuable rights (*y*). A *feme sole* trader may, by the custom of London, be sued in the courts of the city of London upon contracts made by her in the course of her trade (*z*).

Release of the husband from liability upon the wife's contracts after adultery.—Those who furnish the wife with the means of subsistence after a separation by reason of the wife's adultery have no claim against the husband in respect thereof, whether they had notice of the adultery or not at the time they furnished their goods; for the implied authority of a wife who is not living with her husband, to bind her husband by her contracts for necessaries, is put an end to by her adultery (*a*). The previous adultery and misconduct of the husband form no excuse in point of law for the adultery of the wife (*b*). But, if a condonation takes place (*c*), and

(*ss*) See *post*, p. 159.

(*t*) *Field* v. *Sowle*, 4 Russ. 112.

(*u*) *Milnes* v. *Busk*, 2 Ves. jun. 498.

(*x*) *Mace* v. *Cammel*, Lofft. 782; *Edwards* v. *Farebrother*, 2 M. & P. 293; 3 C. & P. 524.

(*y*) *Nicholl* v. *Jones*, 36 L. J. Ch. 554; L. R. 3 Eq. 696; *Lane* v. *McKeen*, 15 Maine, 304.

(*z*) *Caudell* v. *Shaw*, 4 T. R. 361; *Beard* v. *Webb*, 2 B. & P. 92; Lewin on Trusts, 493–499.

(*a*) *Cooper* v. *Lloyd*, 6 C. B. N. S. 524.

(*b*) *Govier* v. *Hancock*, 6 T. R. 603; and see *Needham* v. *Bremner*, L. R. 1 C. P. 583; 35 L. J. C. P. 313.

(*c*) *Keats* v. *Keats*, 28 L. J. P. & M. 78.

the husband receives the wife back again, all her original rights are restored; and the husband cannot then refuse to support and maintain her, unless he can prove the commission of a fresh and subsequent act of adultery (*d*). And, if the husband connives at the adultery of the wife, and continues to reside with her, or permits her to remain under his roof in charge of his children, he cannot refuse to maintain her (*e*). If, however, during the husband's absence abroad, the wife places herself and her husband's children under the protection of a man with whom she resides and carries on an adulterous intercourse, without the knowledge of the husband, the husband is not responsible for things furnished to the children by the wife's order, if he has supplied her with money adequate for the maintenance of the children (*f*).

Desertion of the husband by the wife.—If the wife leaves the husband without just cause, she cannot procure subsistence elsewhere at his expense. If she has returned to a sense of duty after a short absence, the husband would be bound to receive her back; and, if he refused to do so, his liability for necessaries supplied to her would be revived from the time of such refusal. But, if she has deserted her husband for a lengthened period, he is not bound to receive her back or maintain her; "for, if it were so, wives might leave their husbands' bed in the pride of their youth, and return in their useless old age" (*g*). If tradesmen, therefore, part with their goods to a wife living separate from her husband, and then seek to charge the husband with the payment of them, the burden of proving that the separation took place under such circumstances as will entitle them to recover the price from the latter, falls upon their shoulders (*h*). "The mischief," observes Abbot, C. J., "of allowing the ordering of goods by a married woman living apart from her husband to be *primâ facie* evidence, so as to charge him for them, would be incalculable" (*i*).

Desertion of the wife by the husband.—If the husband separates from his wife, and leaves her destitute, without being able to prove that she has forfeited her marriage rights by adultery, the law gives her a right to support herself upon the credit, and at the expense, of her husband; and any tradesman who at her request supplies her with necessaries suitable to her station in life, in contemplation of law, supplies them to the husband himself, and may recover the amount as a debt due to him from the latter (*k*). And the wife may also pledge the husband's credit for necessaries for the main-

(*d*) *Harris* v. *Morris*, 4 Esp. 41.

(*e*) *Norton* v. *Fazan*, 1 B. & P. 227; *Robison* v. *Gosnold*, 6 Mod. 172.

(*f*) *Atkyns* v. *Pearce*, *ante* p. 137.

(*g*) *Manby* v. *Scott*, 1 Lev. 5.

(*h*) *Clifford* v. *Laton*, 3 C. & P. 16; *Edwards* v. *Towels*, 6 Sc. N. R. 641.

(*i*) *Mainwaring* v. *Leslie*, 1 M. & M. 18.

(*k*) *Harris* v. *Morris*, 4 Esp. 41; *Bolton* v. *Prentice*, 2 Str. 1214.

tenance of their children of tender years, living with her against his will, by the order of the court (*l*). A person who advances to a deserted wife money to enable her to supply herself with necessaries has an equitable claim against the husband for so much of the money as is actually applied by the wife in paying for necessaries (*m*); but, if the wife has separate income of her own, adequate to her support, the husband is not then bound to maintain her (*n*); and, if the husband offers to support her, he does not "refuse to maintain her" under stat. 5 Geo. 4, c. 83, s. 3 (*o*); but her authority to support herself at his expense is not at an end (*oo*). The law does not of course sanction a wife in running into extravagance. "It makes her the husband's agent to order such things as are reasonable and necessary for herself; but it gives her no liberty to pledge his credit for anything beyond what is reasonably necessary" (*p*).

Where a wife, being violently turned out of doors and threatened by her husband, employed an attorney to exhibit articles of the peace against him, it was held that the husband was responsible for the payment of the attorney's charges (*q*); for, whenever the husband by his conduct compels the wife to appeal to the law for protection, she may charge him for the necessary expense of the proceedings as much as for the necessary food or raiment (*r*), and her solicitor may sue for his necessary costs (*s*). But an indictment against the husband is not necessary for the protection of the wife; and, therefore, where a husband, having ill-treated his wife, was indicted on her prosecution, and fined and imprisoned, and a brother of the wife advanced money to pay the expenses of the prosecution, it was held that he was not entitled to recover the amount from the husband (*t*). The husband is not liable for expenses incurred by the wife without his sanction in procuring a deed of separation (*u*), nor for the costs of a suit instituted on her behalf for a judicial separation, where proper care has not been taken to ascertain that the suit was rightly instituted (*x*). But a husband has been held liable for preliminary expenses incidental to a suit for restitution of conjugal rights, and for the expenses of

(*l*) *Bazeley* v. *Forder*, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237.

(*m*) *Jenner* v. *Morris*, 3 De G. F. & J. 45; 30 L. J. Ch. 361; *Deare* v. *Soutten*, L. R. 9 Eq. 151; and see *Johnston* v. *Manning*, 12 Ir. C. L. Rep. 148.

(*n*) *Liddlow* v. *Wilmot*, 2 Stark. 86; *Johnston* v. *Sumner*, 3 H. & N. 266; 27 L. J. Ex. 341.

(*o*) *Flannagan* v. *Bishop Wearmouth*, 8 Ell. & Bl. 455.

(*oo*) *Emery* v. *Emery*, *post*, p. 144.

(*p*) *Emmett* v. *Norton*, 8 C. & P. 510.

(*q*) *Turner* v. *Rooks*, 10 Ad. & E. 47; *Shepherd* v. *Mackoul*, 3 Campb. 327.

(*r*) *Brown* v. *Ackroyd*, 5 Ell. & Bl. 826.

(*s*) *Ottaway* v. *Hamilton*, 3 C. P. D. 393, C. A.

(*t*) *Grindell* v. *Godmond*, 5 Ad. & E. 755.

(*u*) *Ladd* v. *Lynn*, 2 M. & W. 265; and see *Pearson* v. *Darrington*, 32 Ala. 227; *Williams* v. *Monroe*, 18 B. More, 514; *Johnson* v. *Williams*, 3 Iowa, 197.

(*x*) *Hooper*, *in re*, 33 L. J. Ch. 305; 2 De G. J. & S. 91; and see *Shelton* v. *Pendleton*, 18 Conn. 417.

obtaining counsel's opinion on the effect of an ante-nuptial agreement for a settlement, and of obtaining professional advice as to the proper mode of dealing with tradespeople who were pressing her for payment for necessaries supplied by them to her since the desertion, and of preventing a threatened distress for rent (*y*), and for the costs necessarily incurred by the wife in filing a petition for a judicial separation, although the petition was not proceeded with, and although the course prescribed by the practice of the Divorce Court for obtaining the wife's costs was not pursued (*z*).

What amounts to an expulsion of the wife by the husband.—If by cruelty the husband renders it morally impossible for the wife to continue to reside with him, and she accordingly leaves him, this is as much an expulsion as if he had turned her out by main force (*a*). If the husband brings home a loose woman, and treats her as a member of his family, this is a sufficient cause for the wife's leaving him; and so is the existence and continuance of an adulterous intercourse on the part of the husband with another woman (*b*). Whenever the wife has once left her husband under justifiable circumstances, she is not bound to return upon the invitation of the latter; and the husband's liability for necessaries furnished to her cannot be determined by a request on his part that she will again return to his protection (*c*).

Liability of the husband for necessaries supplied to the wife during a separation by mutual consent.—The husband is responsible for necessaries furnished to the wife during the continuance of a separation by mutual consent, unless she has competent provision from him or from funds at her own disposal; if she has such a provision, it lies on the husband to show it (*d*), and on the creditor to prove that it is insufficient (*e*). If the wife leaves her home in consequence of a quarrel with the husband in which they are mutually to blame, and obtains lodging and the necessaries of life at the hands of a third party, the husband will be responsible for the board and lodging and necessaries provided for her (*f*). Where a wife voluntarily left her husband's house, and went to reside with her brother about a mile distant, with whom she continued to live apart from her husband until her death many years after, when her brother, without any communication with the husband, buried her in a suitable manner, it was held that the brother was entitled to recover from the husband the expenses of the funeral (*g*). But

(*y*) *Wilson* v. *Ford*, L. R. 3 Ex. 63; 37 L. J. Ex. 60.

(*z*) *Rice* v. *Shepherd*, 12 C. B. N. S. 322.

(*a*) *Baker* v. *Sampson*, 14 C. B. N. S. 383; *Blowers* v. *Sturtevant*, 4 Denis, 46.

(*b*) *Houliston* v. *Smyth*, 3 Bing. 127.

(*c*) *Emery* v. *Emery*, 1 Y. & J. 505, 506.

(*d*) *Dixon* v. *Hurrell*, 8 C. & P. 719.

(*e*) *Johnston* v. *Sumner*, *ante*, p. 134.

(*f*) *Reed* v. *Moore*, 5 C. & P. 200.

(*g*) *Bradshaw* v. *Beard*, 12 C. B. N. S. 344; 31 L. J. C. P. 273.

in all cases of voluntary separation, unaccompanied by cruelty, the husband may put an end to his liability for necessaries by requiring the wife to return to him, and prohibiting parties from continuing to give her credit (*h*); and his liability is in all cases dependent upon the pecuniary means at the wife's disposal (*i*). A mere covenant or agreement to make an allowance for the wife's maintenance will not of itself exonerate the husband from his liability. He must show that the covenant has been fulfilled, and that the allowance has been regularly paid, and that it is sufficient or has been accepted by the wife as sufficient, for her suitable support (*k*). Where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance, which is paid, she has no authority to pledge his credit, although the allowance is inadequate, for the consent to the separation is given upon the terms that she agrees to the adequacy of the allowance (*l*). If the husband, from any of the preceding causes, is absolutely discharged from his obligation to maintain the wife, the latter does not, in consequence thereof, acquire any power or capacity of contracting on her own account, so as to incur any liability upon her contracts. She herself remains exempt, by reason of the coverture, from all personal responsibility *ex contractu;* though he who trusts her may in general, if she has property settled to her separate use, take proceedings to make that property available for the satisfaction of her debts (*m*).

Effect of a decree for a judicial separation.—By the Divorce Act, 20 & 21 Vict. c. 85, s. 26, it is enacted that, in every case of a judicial separation, the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contracting and suing and being sued, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any costs she may incur as plaintiff or defendant; but, where, upon any judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same has not been duly paid by the husband, he is then liable for necessaries supplied for the wife's use (*n*). By the 21 & 22 Vict. c. 108, s. 8, no discharge, variation, or reversal of any decree for a judicial separation is to prejudice or affect any rights or remedies which any person would otherwise have had in respect of any debts, contracts or acts of the wife

(*h*) *Hindley* v. *Westmeath*, 6 B. & C. 200.

(*i*) *Mizen* v. *Pick*, 3 M. & W. 481; *Tod* v. *Stokes*, 12 Mod. 245; as to the liability of a lunatic husband, see *post*, p. 150.

(*k*) *Nurse* v. *Craig*, 2 B. & P. N. R. 148; *Burrett* v. *Booty*, 8 Taunt. 343.

(*l*) *Biffin* v. *Bignell*, 7 H. & N. 877; 31 L. J. Ex. 189; *Eastland* v. *Birchell*, 3 Q. B. D. 432.

(*m*) *Ante*, p. 139; *Murray* v. *Barlee*, M. & K. 220.

(*n*) *Hunt* v. *De Blaquiere*, 5 Bing. 550.

incurred, entered into, or done, between the making of the decree and the discharge, variation, or reversal thereof (*o*).

Orders for the protection of the property and earnings of a deserted wife place the wife during the continuance of the order and the desertion in the like position in all respects with regard to property and contracts, and suing and being sued, as if she had obtained a decree for a judicial separation (*p*). Such orders are, however, confined to money or property acquired by lawful industry, and do not extend to property acquired by keeping a brothel (*q*).

Transportation of the husband for a term of years operates as a suspension of the civil and marital rights of the husband during the continuance of the term of banishment (*r*), and until he has actually returned to this country after the expiration of his sentence (*s*). He is not, when the exile is a mere temporary exile, civilly dead (*t*); but the effect, as regards the capacity of the wife to contract and to be sued as a *feme sole,* is precisely the same as if he were so. But a voluntary absence beyond the sea, on the part of the husband, or a compulsory absence in the service of the state, does not in anywise alter or affect the legal position of the wife. If the husband has been banished for the term of his natural life, he is civilly dead, and the wife is then remitted to the position of a *feme sole* (*u*). If the husband is an alien enemy, he has no legal existence in this country; and, so long as he remains in that position, his wife resident here is looked upon as a *feme sole;* and she is, consequently, liable to be sued upon all contracts entered into by her, just the same as if she were a widow (*x*). But if he is an alien *ami,* his wife is in the same plight as any other married woman.

Death of the husband.—The death of the husband does not render the wife responsible upon any contracts made by her during coverture; nor is she responsible upon any promise, made after the death of the husband, to pay for things furnished her in his lifetime, as such a promise is without consideration (*y*). Contracts entered into by the wife after the death of the husband, but before it was known, are not binding on her (*z*).

Liabilities resulting from reputed marriages.—"If a man,"

(*o*) See *Nicholson* v. *Drury Buildings Co.*, 7 Ch. D. 48.
(*p*) 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, ss. 6—10.
(*q*) *Mason* v. *Mitchell*, 3 H. & C. 528; 34 L. J. Ex. 68.
(*r*) *Ex parte Franks*, 1 M. & Sc. 11.
(*s*) *Carroll* v. *Blencow*, 4 Esp. 28.
(*t*) *Co. Litt.* 133, a.
(*u*) *Co. Litt.* 133, a.; *Countess of Portland* v. *Prodgers*, 2 Vern. 104; *Ex parte Franks*, 1 M. & Sc. 11.
(*x*) *Derry* v. *Duchess of Mazarine*, 1 Raym. 147; but see *De Wahl* v. *Branne*, 1 H. & N. 178; 25 L. J. Ex. 343.
(*y*) *Meyer* v. *Haworth*, 8 Ad. & E. 467.
(*z*) *Smout* v. *Ilberry*, 10 M. & W. 1; *Blades* v. *Free*, 9 B. & C. 167; Poth. Obl. No. 81.

observed Lord Kenyon, "has permitted a woman to whom he was not married to use his name, and pass for his wife, and in that character to contract debts, he is liable for her debts, whether the tradesman who furnished the goods knew the circumstance to be so or not. But this must not be taken to apply to the case of a common strumpet, who may assume the name of a person without his authority, from having casually known him; it must be where the man permits the woman to assume his name, where she lives in his house, and is part of his family (*a*). And it matters not whether the man so acting is a married man or a single man. If he lives with the woman, and gives her every appearance of being his wife, the proof of a previous marriage with some other woman cannot exonerate him from liability (*b*). Having once held out the woman as his wife, the reputed husband is bound, when the connection ceases, to make the termination of it notorious, in order to escape from the difficulties of his position (*c*).

Contracts with bankrupts.—For the protection of persons having *bonâ fide* dealings with a bankrupt after the act of bankruptcy, but without notice of it, it is enacted by the Bankruptcy Act of 1869 that nothing in that act shall render invalid any contract or dealing with any bankrupt made in good faith and for valuable consideration before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication (*d*). The Act also provides that, subject and without prejudice to the provisions of the Act relating to the proceeds of the sale and seizure of goods of a trader, and to the provisions avoiding certain settlements, and avoiding, on the ground of their constituting fraudulent preferences, certain conveyances, charges, payments, and judicial proceedings, the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy:—Any disposition or contract with respect to the disposition of property by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise, howsoever made, by any bankrupt in good faith, and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication (*e*).

(*a*) *Watson* v. *Threlkeld*, 2 Esp. 637.

(*b*) *Robinson* v. *Nahon*, 1 Campb. 245.

(*c*) *Ryan* v. *Sams*, 17 L. J. Q. B. 271; 12 Q. B. 460.

(*d*) 32 & 33 Vict. c. 71, s. 94; as to what are protected transactions under this section, see *In re Waugh, ex parte Dicken*, 4 Ch. D. 524; *Ex parte Jay*, 14 Ch. D. 19, C. A.; *Ex parte Richdale*, 19 Ch. D. 409, C. A.

(*e*) Sect. 95.

Liabilities of trustees in bankruptcy.—If the trustees of a bankrupt permit the bankrupt to carry on his trade for the benefit of the estate, they will be responsible for the payment of the price of goods ordered and used by him in the exercise of such trade (*f*). But one trustee is not responsible at common law for things ordered or work done by one of his colleagues without his knowledge, sanction, or authority.

Contribution between trustees in bankruptcy.—If, in the course of the administration of the estate, the trustees enter into joint contracts, and incur a joint liability thereon, and one alone is compelled to pay the whole amount due on such contracts, he has a right to an action for contribution against his co-trustee, whether the latter has or has not in his hands any funds from the bankrupt's estate (*g*).

Contracts with drunkards.—A party who makes a contract in such a state of drunkenness as not to know what he is doing, cannot be compelled to perform that contract by the other party who knew him to be in that state. A man who takes an obligation from another so circumstanced is guilty of actual fraud. Therefore, where an action was brought upon a bill of exchange by the indorsee against the indorser, and the defendant pleaded that at the time he indorsed the bill he was so drunk as to be unable to comprehend the meaning or effect of the indorsement, or to contract thereby, of which the plaintiff at the time of the indorsement had notice, it was held that the plea was a good answer to the action (*h*). But a contract made by a man in a state of drunkenness is voidable only and not void; and, therefore, the drunken man may, if he pleases, ratify it after he becomes sober, and it will then be binding upon him (*i*). It has been said that a bill of exchange or a promissory note, indorsed or accepted or made by a person in a *complete* state of intoxication, cannot be enforced, as against the drunkard, by a *bonâ fide* holder who received and gave value for it on the credit of the acceptance or indorsement, or signature, in ignorance of the drunkenness and of the fraudulent circumstances under which the instrument was obtained (*k*); but this seems very doubtful, and it is clearly otherwise if the party was only partially intoxicated at the time he accepted or indorsed the instrument (*l*).

Contracts with lunatics.—If a party to a contract was, at the time he entered into the engagement, a lunatic or of unsound

(*f*) *Kinder* v. *Howarth*, 2 Stark. 354.

(*g*) *Hart* v. *Biggs*, Holt, 245; *Bevan* v. *Whitmore*, 15 C. B. N. S. 433, 763.

(*h*) *Gore* v. *Gibson*, 13 M. & W. 623; 14 L. J. Ex. 152; *Cole* v. *Robins*, Bull. N. P. 172, a.; *Pitt* v. *Smith*, 3 Campb. 33; *Fenton* v. *Holloway*, 1 Stark. 126; *Hamilton* v. *Grainger*, 5 H. & N. 4; Poth. OBLIGATIONS, No. 49.

(*i*) *Matthews* v. *Baxter*, L. R. 8 Ex. 132.

(*k*) *Sentance* v. *Poole*, 3 C. & P. 1.

(*l*) *Shaw* v. *Thackray*, 17 Jur. 1045.

mind, and any imposition appears to have been practised upon him, or any advantage taken of his infirmity by the other contracting parties, the contract will be void, as having been procured by fraud; but, if the contract is a fair and honest contract, and bears no symptoms of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contract (m). A lunatic, however, will not be bound by any deed entered into by him (n), unless it be shown that it was entered into during a lucid interval; and, if it be a necessary and beneficial contract for him to enter into, such as a lease of his lands at an advantageous rent, the nature of the contract may be *primâ facie* evidence of its having been made during a lucid interval (o). An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, or servants, cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the goods, or had the benefit of the work, or the use of the horses, carriages, and servants (p); for the law will not permit the lunatic's infirmity to be made an instrument of fraud upon third parties who have dealt with him in good faith (q). If a lunatic, apparently of sound mind, and not known to be otherwise, enters into a fair and *bonâ fide* contract, such contract cannot afterwards be set aside. Therefore, where a lunatic purchased of an assurance company two annuities for his life, and paid down the purchase-money, the company having at the time no knowledge of his lunacy, it was held that the contract could not be avoided (r). And, where a lunatic contracted for the purchase of an estate and paid down a deposit, and the vendor treated fairly and in good faith, and in ignorance of the infirmity of the lunatic, it was held that the deposit could not be recovered back (s). Although contracts by lunatics cannot be carried into execution against them, yet, if they were of sound mind when the contract was made, and the imbecility of intellect has subsequently intervened, the rights of the parties will not be altered (t). The lunacy of a husband is no answer to an action brought against him upon the ordinary implied contract in respect of necessaries furnished to his wife (u);

(m) *Manby* v. *Bewicke*, 3 K. & J. 342; *Jenkins* v. *Morris*, 14 Ch. D. 674.

(n) *Yates* v. *Boen*, 2 Str. 1104; *Thompson* v. *Leech*, 3 Salk. 301; Vin. Abr. (LUNATIC); *Beverley's case*, 4 Co. 123, b.

(o) *Sergeson* v. *Sealey*, 2 Atk. 413; *Faulder* v. *Silk*, 3 Camph. 126; *Creagh* v. *Blood*, 2 Jones & Lat. 509.

(p) *Brown* v. *Jodrell*, 3 C. & P. 30; M. & M. 105; *Niell* v. *Morley*, 9 Ves. 478; *Dane* v. *Kirkwall*, 8 C. & P. 679; *Bagster* v. *Earl of Portsmouth*, 7 D. & R. 614; 5 B. & C. 170.

(q) *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L. J. Ch. 296.

(r) *Molton* v. *Camroux*, 4 Exch. 17; 18 L. J. Ex. 68, 358.

(s) *Beavan* v. *M'Donnell*, 9 Exch. 309; 23 L. J. Ex. 94; *Brice* v. *Berrington*, 3 Mac. & G. 486.

(t) Ld. Eldon, *Owen* v. *Davies*. 1 Ves. sen. 82; *Hall* v. *Warren*, 9 Ves. 605.

(u) *Read* v. *Legard*, 20 L. J. Ex. 309; 6 Exch. 636; *Davidson* v. *Wood*, 1 De G. J. & S. 465; 32 L. J. Ch. 400.

for the authority given by law to a destitute wife to pledge the credit of her husband for her support is not revoked by the husband becoming insane.

Where the husband whilst of sound mind had given the wife authority to deal with the plaintiff, and she, after he had become insane, ordered goods, and the *plaintiff was not aware of the insanity of the husband,* it was held that the husband upon his recovery might be sued for the goods (*x*). But the authority of a wife to pledge her husband's credit is not greater in the case of a lunatic husband than in the ordinary case of husband and wife; and, therefore, if she has an income adequate to maintain her in her station of life, she cannot pledge the lunatic husband's credit (*y*). Equity will raise an implied contract, and enforce a demand against the lunatic or his estate for monies expended for the necessary protection of his person or estate (*z*).

Contracts with alien friends.—Every subject of a friendly state resident in this country has the same power of entering into and enforcing personal contracts as the natural-born subjects of the realm (*a*). Formerly an alien could not purchase or hold any estate of freehold or inheritance in lands or tenements, because such an interest in the soil was supposed to require a permanent allegiance; and he could not, therefore, lawfully enter into or enforce any contracts connected with the acquisition and enjoyment of freehold estates (*b*). By the 7 & 8 Vict. c. 66, s. 4 (repealed by the 33 Vict. c. 14, *infra*), every alien, being the subject of a friendly state, might take and hold every species of personal property whatever, except chattels real, by purchase, gift, representation, or otherwise, as if he were a natural-born subject; and every alien friend residing in this country might, by grant, lease, demise, assignment, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or occupation, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years (*c*). And now, by the 33 Vict. c. 14, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. But nothing in that Act is to qualify an alien to be the owner of a British ship (*d*). If, after a contract has been made with an alien friend, a war breaks out between his country and this, his right of action on the

(*x*) *Drew* v. *Nunn*, 4 Q. B. D. 661, C. A.

(*y*) *Richardson* v. *Du Bois*, L. R. 5 Q. B. 51; 39 L. J. Q. B. 69.

(*z*) *Williams* v. *Wentworth*, 5 Beav. 325; *Stedman* v. *Hart*, Kay, 607.

(*a*) Com. Dig. ALIEN, c. 5; *Openheimer* v. *Levy*, 2 Str. 1082.

(*b*) *Calvin's case*, 7 Co. 23, a.; Co. Litt. 2. b.; 1 Woodd. lect. ALIENS; Roll. Abr. 194.

(*c*) The statute 32 Hen. 8, c. 16, s. 13, is virtually repealed. See Stat. Law Rev. 1863.

(*d*) Sect. 14.

contract is suspended until the return of peace (e). The crown may indeed, if it thinks fit, lay hands on all his debts and choses in action, and prevent him from afterwards putting them in suit; but, if it does not think fit so to do, his rights are restored on the return of peace (f).

Contracts with alien enemies.—All alien enemies, and all British subjects and subjects of neutral nations domiciled in any enemy's territory, or engaged in the service of a hostile power (g), are disabled from contracting with British subjects unless they have obtained a licence to trade. But they may lawfully provide for the wants and necessities of Englishmen detained abroad, and may enforce contracts made for such purposes on the return of peace (h). So long as hostilities last they are utterly disabled from suing in our courts of justice, although they may be sued if they reside within their jurisdiction. In one case it was held that a natural-born subject might sue in trust for an alien enemy (i); but this decision seems to be at variance with numerous authorities (k). If a subject of a state at war with this country resides here with the licence and permission of the crown, he has the same rights and privileges as an alien friend (l). But the mere fact of the residence of a party in this country, without disturbance or interruption, is not evidence of a licence from the crown, unless it be shown that the government was cognizant of his being here, and sanctioned his stay (m).

Prisoners at war, remaining in the realm under the protection of the crown, may enter into and enforce personal contracts, unless the crown interferes to prevent them. They may sue for the wages of labour, or for the price of goods sold and delivered; and they appear to have the same civil rights and privileges as alien friends (n).

Disabilities of convicts.—When a person has been convicted of treason or felony, and has been sentenced to death or penal servitude, he is precluded by the 33 & 34 Vict. c. 23, from alienating or charging any property, or making any contract (o).

(e) *Flindt* v. *Waters*, 15 East, 260; Co. Litt. 129, b.; *Boussmaker, ex parte*, 13 Ves. 71.

(f) 1 Rolle Abr. ALIEN, B. pl. 3; Bro. DENIZEN, pl. 16, 20.

(g) *Roberts* v. *Hardy*, 3 M. & S. 534; *M'Connell* v. *Hector*, 3 B. & P. 113; *O'Mealy* v. *Wilson*, 1 Campb. 482; *The Ocean*, 5 Rob. 90.

(h) *Antoine* v. *Morshead*, 6 Taunt. 237; *Duhammel* v. *Pickering*, 2 Stark. 92.

(i) *Daubuz* v. *Morshead*, 6 Taunt. 332.

(k) *Brandon* v. *Nesbitt*, 6 T. R. 23; *Bristow* v. *Towers*, *ib.* 35; *Brandon* v. *Curling*, 4 East, 413; *Warin* v. *Scott*, 4 Taunt. 605; *Albrecht* v. *Sussman*, 2 Ves. & B. 323; *Willison* v. *Patteson*, 7 Taunt. 447; *Kensington* v. *Inglis*, 8 East, 288.

(l) *Wells* v. *Williams*, 1 Ld. Raym. 282; 1 Salk. 46; *Casseres* v. *Bell*, 8 T. R. 166; Vin. Abr. ALIEN (I.) pl. 8.

(m) *Boulton* v. *Dobree*, 2 Campb. 162; *Alciator* v. *Smith*, 3 Campb. 244.

(n) *Sparenburgh* v. *Bannatyne*, 1 B. & P. 170; *Maria* v. *Hall*, 2 B. & P. 236; 1 Taunt. 33, n.

(o) Sect. 8. He can pay a debt claimed by a debtor's summons, and if he fails he will commit an act of bankruptcy. *Ex parte Greaves*, 19 Ch. D. 1.

The convict may, however, make contracts when he is lawfully at large under any licence, and may sue in respect thereof (*p*). And his disability ceases altogether when he has suffered his punishment or received a pardon (*q*).

The administrator of a convict's property, appointed in the manner prescribed by the Act (*r*), may let, mortgage, sell, convey, or transfer any part of such property at his discretion (*s*); and all such contracts, *bonâ fide* made by the administrator under the powers of the Act, will be binding on the convict, and on all persons claiming an interest in the property by virtue of that Act (*t*).

Disabilities of outlaws.—When a person has been outlawed he is civilly dead, and is incapable of enforcing any contract he may have entered into (*u*), although he is liable to be sued thereon (*x*).

An attainted man, although civilly dead for some purposes, is nevertheless capable of contracting in a foreign country a marriage which will be deemed valid in England, if it was valid by the law of that country (*y*).

The incompetency to contract and sue may be removed by means of a reversal of the outlawry.

Parties privileged from actions and suits.—A foreign sovereign cannot be sued in the courts of this country, unless he appears and consents to the action (*z*); and even then he does not lose his rights as a foreign sovereign (*a*); and the same privilege was extended to the ambassadors and ministers of foreign reigning sovereigns, their secretaries, and domestic servants (*b*).

Mandamus to parties to contracts.—By the Judicature Act, 1873, (*c*), sec. 25 (8), a mandamus may now be granted by an interlocutory order of the court (*d*) in all cases in which it shall appear to be just or convenient that such order should be made, either unconditionally or upon terms. The meaning of this seems to be that the writ will be granted in the class of cases where it would before have issued in the Common Law Courts, but that the courts are to have a wide discretion as to the issue of the writ,

(*p*) Sect. 30.
(*q*) Sect. 7.
(*r*) Sect. 9.
(*s*) Sect. 12.
(*t*) Sect. 17.
(*u*) Hawk. P. C. lib. 2, c. 49, s. 9.
(*x*) *Macdonald* v. *Ramsey*, Foster, 61.
(*y*) *Kynnaird* v. *Leslie*, L. R. 1 C. P. 389; 35 L. J. C. P. 226.
(*z*) *Brunswick (Duke of)* v. *King of Hanover*, 6 Beav. 1; *Wilson* v. *Church*, 13 Ch. D. 1; *Twycross* v. *Dreyfus*, *ante*, p. 71.
(*a*) *Vavasseur* v. *Krupp*, 9 Ch. D. 351.
(*b*) 7 Anne, c. 12. This, however, is not so now, as ss. 1, 2, of the Act have been repealed, see Stat. Law Rev. 1867.
(*c*) 36 & 37 Vict. c. 66, s. 25 (8).
(*d*) A Chancery judge may now issue such a writ in a cause before him. See *Re Paris Skating Rink Co.*, 6 Ch. D. 731. It would seem, however, that the Queen's Bench Division is the proper Court to issue such a writ. See *Glossop* v. *Heston Local Board*, 12 Ch. D. *per* James, L. J., pp. 115, 116, *per* Brett, L. J. p. 122.

and also to facilitate the proceeding by allowing the writ to issue upon interlocutory applications instead of being claimed by indorsement upon a writ or by pleadings in an action, without in fact an action of mandamus (e). It is said by Brett, L. J., that the mandamus here spoken of "is not the prerogative writ, but only a mandamus which may be granted to direct the performance of some act, of something to be done, which is the result of an action where an action will lie" (f): that is to say, that it is in the nature of a mandatory injunction, and not of a writ issuing where there has been a positive refusal to perform a public duty or negligence amounting to a positive refusal.

Mandamus to public companies to make calls.—Where a public board or corporate body is clothed with certain defined statutory powers, and is authorised to enter into contracts, and has the power of creating, by calls on shareholders, a future corporate property, from time to time, out of the private assets of its individual members, and contracts are made with the corporation on the faith that an honest exercise will be made of these powers, and it is clearly established that the corporation is evading the payment of its just debts, and the due satisfaction of a judgment recovered against them, on the ground that they have no corporate assets in hand wherewith to pay, the court will, by mandamus, compel them to exercise the powers vested in them for raising funds, and answer the demands of their creditors (g). But where an action has been brought against a corporation for a debt claimed to be due, and judgment has been recovered, and the plaintiff has the ordinary legal remedy of an execution, the court will not issue a mandamus merely because the execution may produce no fruits (h).

Mandamus to local boards, commissioners, trustees, and public officers to levy rates and satisfy and discharge a judgment-debt or a pecuniary obligation.—Whenever judgment has been recovered in an action against the clerk of a local board, or of commissioners or trustees, in respect of something done by such commissioners or trustees in execution of statutory powers, exempting them from personal liability, the judgment-creditor, when he fails to obtain satisfaction of his judgment-debt from the corporate estate and effects of the board, is, in general, entitled to a mandamus to compel the board or other public body to levy a rate, and discharge the judgment-debt. Wherever public officers

(e) See Wilson's Judicature Acts, 2nd. ed. p. 29, but see as to indorsement for injunction, *Colebourne* v. *Colebourne*, 1 Ch. D. 690.

(f) *Glossop* v. *Heston Local Board*, 12 Ch. D. at p. 122.

(g) *Rex* v. *S. Cath. Dock Co.*, 4 B. & Ad. 360. See *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642.

(h) *Reg.* v. *Victoria Park Co.*, 1 Q. B. 292.

have borrowed money upon the security of rates they are authorised to impose, and have not themselves contracted any personal liability to pay, a mandamus will go to compel them to make a rate and repay the money (*i*). If an Act of Parliament authorises parish officers, commissioners of public works, or boards of health, to enter into contracts for public works, to employ subordinate salaried officers, and to charge the costs and expenses they incur upon rates they are authorised to impose, and contracts are made by them, and officers appointed, and expenses incurred, and there is no personal liability to pay, and the ordinary remedy by way of action is not available, the court will, by mandamus, compel them to make a rate, and provide themselves with funds, and pay such expenses (*k*).

Under s. 89 of the Local Board of Health Act, 11 & 12 Vict. c. 63 (*l*), a local board of health might be compelled by mandamus to make a rate for the purpose of satisfying a judgment within six months after the judgment had been obtained against them (*m*). And the remedy is not, generally speaking, available after the six months have expired (*n*). But a rate may be ordered in aid of a judgment within six months after the judgment was obtained, although the action on which the judgment was obtained was commenced more than six months after the claim accrued, if the delay is excused and shown not to have been undue (*o*).

Actions in which a claim for a mandamus may be sustained.—Wherever, by charter or Act of Parliament, a duty is imposed upon a corporate body or chartered company, in the fulfilment of which the plaintiff is interested, and in respect of the non-fulfilment of which the plaintiff is entitled to maintain an action for damages, he may claim a mandamus for the fulfilment of the duty (*p*). Thus where the plaintiff, in an action for a mandamus against a trading company, set forth the incorporation of the company by letters patent, directing amongst other things that the capital of the company should be divided into shares, and provision made for the registration of the names of all the proprietors of such shares; and showed that a register of share-

(*i*) *Reg.* v. *Brancaster Churchwardens*, 7 Ad. & E. 458.

(*k*) *Reg.* v. *Hurstbourne Tarrant, &c.*, 27 Law J. M. C. 214; Ell. Bl. & Ell. 246; *Reg.* v. *Norfolk Commissioners of Sewers*, 20 Law J. Q. B. 121; *Bogg* v. *Pearse*, 10 C. B. 542; 20 Law J. C. P. 99.

(*l*) This Act is repealed, but there is a similar provision in the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 210.

(*m*) *Reg.* v. *Rotherham*, 8 Ell. & Bl. 906; 27 Law J. Q. B. 156.

(*n*) *Burland* v. *Kingston-upon-Hull Local Board*, 32 Law J. Q. B. 17; in other cases, the plaintiff is not concluded by delay, *Ward* v. *Lowndes*, 17 C. B. 940; *Reg.* v. *Churchwardens, &c.*, 27 Law J. M. C. 215; see *Bush* v. *Martin*, 2 H. & C. 311.

(*o*) *Worthington* v. *Hulton*, L. R. 1 Q. B. 63; see *Ringland* v. *Lowndes*, 33 Law J. C. P. 25.

(*p*) See *Morgan* v. *Metrop. Ry. Co.*, L. R. 3 C. P. 553.

holders had been established, in conformity with the provisions of the charter; and that the plaintiff was entitled, as the executor of a deceased shareholder, to have his name inserted in such register, averring that he was personally interested, &c., and had sustained damage, and had made a demand on the company to have his name entered, and that they had refused, &c., it was held on demurrer that the plaintiff was entitled to the writ; for wherever there is a duty in the fulfilment of which the plaintiff is personally interested, and which ought to be fulfilled under royal charter, the non-performance being a grievance to an individual, that is a case for a mandamus (*q*). It is a case also where a prerogative writ would be granted independently of the statute (*r*).

So, where the plaintiff having set forth that the defendants were a joint-stock company, duly incorporated under the Joint-Stock Companies Act, and that the plaintiff was duly entered on the register of shareholders as a holder and proprietor of certain shares, numbered, &c., and that the defendants removed his name from the register, and refused, after demand, to restore it, &c., and claimed damages and a mandamus, it was held that the claim was properly made (*s*).

Where the plaintiff, in his declaration against the clerk of a local board of health, set forth that certain improvement commissioners, appointed under a local Act, contracted to pay him a certain sum for certain services towards carrying into effect the purposes of the Act; that the services were rendered, but the commissioners neglected to pay, and that afterwards, by virtue of another Act of Parliament, the duties of the commissioners were transferred to the local board of health; and it was enacted that all debts payable by the commissioners should be satisfied by the local board out of rates they were authorised to levy; and the declaration went on to show that the debt remained unpaid; that the plaintiffs were personally interested in the levying a rate for payment thereof; that they had demanded and been refused payment and a rate, and sustained damage; and they then claimed a mandamus; and the cause went to trial, and the damages were assessed, it was held that the plaintiff was entitled to the mandamus claimed. "The provisions of the Common Law Procedure Act," observes Hill, J., "now enable a plaintiff, in an action in which he might recover judg-

(*q*) Ld. Campbell, *Norris* v. *Ir. Land Co.*, 8 Ell. & Bl. 512; 27 Law J. Q. B. 116; but a company is not bound to register a transfer not in accordance with the statutable form, *Reg.* v. *Gen. Cem. Co.*, 6 Ell. & Bl. 415; 25 Law J. Q. B. 342; *Copeland* v. *North-East. Ry. Co.*, 6 Ell. & Bl. 277.

(*r*) *Norris* v. *Irish Land Co.*, *supra*; *Rex* v. *Merchant Taylors' Co.*, 2 B. & Ad. 115.

(*s*) *Swan* v. *Brit. Austr. Co.* 7 H. & N. 604; 2 H. & C. 175; *Ward* v. *South-East. Ry. Co.*, 29 Law J. Q. B. 177.

ment, but could not have execution, and would have had to apply for a mandamus, to combine a claim for a mandamus with his action, so that if he succeeds, a mandamus issues as part of the judgment. In such a case, I think the amount of the debt for which the mandamus is ultimately to issue may be ascertained in the action" (*t*).

Commissioners, or the members of a local board, appointed annually for executing the powers of a local Act of Parliament, are generally a fluctuating body in the nature of a corporation, represented by their clerk, who is the party to be sued for services rendered them for purposes within the scope of the Act (*u*). But for the statute, the commissioners who retain, or order the services to be rendered by, the plaintiff, would be personally liable; but as they are acting for public purposes under statutory authority, with power over a public fund created by the statute, they are generally expressly exempted from personal liability, and the burthen of satisfying and discharging the debts they incur in the execution of the purposes of the Act is thrown upon the fund they are authorised to administer. An action to enforce payment of these debts must, as we have seen, be brought against them in the name of their clerk, and when judgment is obtained against the clerk, the public fund, or the rates, are to be resorted to for its satisfaction, and not the private property of the commissioners (*x*). If, therefore, after judgment has been recovered against the clerk, a demand is made upon the commissioners for satisfaction and discharge of the judgment debt, and they neglect to provide themselves with funds, or to make the payment, an action for damages may be brought upon the judgment, and the claim for a mandamus conjoined therewith, to compel the levying of a rate and the satisfaction and discharge of the judgment debt. But, in these cases, the old prerogative writ of mandamus would seem to afford as convenient a remedy for enforcing satisfaction of the judgment debt (*y*) as the bringing of a second action for a mandamus. If a second action is brought it must, in many cases, be commenced within six months of the recovery of the judgment (*z*); and it must appear that the judgment has been recovered against the clerk or secretary of the board in respect of some act or proceeding by the members of the board in the *bonâ fide* execution of the statutory powers entrusted to them, so as to exempt them, and their clerk or secretary, from personal lia-

(*t*) *Ward* v. *Lowndes*, 1 Ell. & Ell. 940; 28 Law J. Q. B. 265; 29 *ib.* 40.

(*u*) *Allen* v. *Hayward*, 7 Q. B. 793; *Bush* v. *Martin*, 33 Law J. Exch. 17.

(*x*) *Hall* v. *Taylor*, Ell. Bl. & Ell. 107; 27 Law J. Q.B. 311; *Kendal* v. *King*, 17 C. B. 483. See Addison on Torts, 5th ed., by Cave, pp. 671, 672.

(*y*) *Ante*, pp. 152, 153.

(*z*) *Burland* v. *Kingston, &c. Local Board*, *ante*, p. 154.

bility (*a*); for if they have exceeded the powers conferred upon them, and are not protected from personal liability by the statute, they cannot charge the debts they incur, or the consequences of their unauthorised proceedings, upon the rates, and a mandamus cannot issue to compel them to do what they have no power or authority to do (*b*).

Actions in which a claim for a mandamus cannot be sustained.—If, in an action for a mandamus, nothing more appears upon the record than that the action is brought for the recovery of a debt incurred by the members of some local board, commissioners, or corporate body, and there is nothing to exclude the personal liability of the defendants, and to show that a public duty is sought to be enforced, or that the ordinary remedy by action would not be available, a claim for a mandamus cannot be sustained (*c*). Thus, where the plaintiffs in an action for a mandamus set forth that the defendant, as clerk to certain commissioners, for putting into execution a local improvement act, became indebted to the plaintiffs for certain salary, due to them for services rendered to the commissioners under the provisions of the Act upon the retainer and request of the commissioners, and also for work and labour, journeys and attendances, as solicitors for the commissioners upon their retainer, &c., and for fees, &c., money paid, &c., and on an account stated, and that these debts were a charge upon any monies and funds which might be in the hands of the commissioners, if the commissioners had funds, and, if not, then upon a rate leviable under the statute; that the plaintiffs were personally interested, &c.; that they demanded and were refused payment, and sustained damage, &c., and the plaintiffs then claimed a mandamus, it was held, on demurrer, that no right to a mandamus had been shown, for there were various ways in which the commissioners might retain the services of an attorney in matters relating to their official duties, and become personally liable in respect thereof; and there was nothing to show that the debt claimed could not be recovered by the ordinary remedy by way of action of debt (*cc*). Where the performance of the duty is impossible by reason of insufficient funds the Court will not issue a writ (*d*).

Declaration in an action for a mandamus.—When the man-

(*a*) *Southampton, &c., Bridge Co.* v. *Southampton Local Board*, 8 El. & Bl. 801; 28 L. J. Q. B. 41.

(*b*) *Duncan* v. *Findlater*, 6 Cl. & F. 908; *Bush* v. *Beavan*, 32 Law J. Exch. 58.

(*c*) *Benson* v. *Paull*, 6 E. & B. 273; *Norris* v. *Irish Land Co.*, 8 E. & B. 512; *Bush* v. *Beavan*, 32 Law J. Exch. 60; some of the passages in the judgment in this case do not appear to be reconcileable with the judgment of the Court of Queen's Bench, in narrowing the operation of ss. 69, 70, and 71, of the Common Law Procedure Act, 17 & 18 Vict. c. 125; *Ward* v. *Lowndes*, 1 Ell. & Ell. 940; 28 Law J. Q. B. 265.

(*cc*) *Bush* v. *Beavan*, *supra*.

(*d*) *Re the Bristol Ry. Co.*, 3 Q. B. D. 10.

damus is claimed for the satisfaction and discharge of a pecuniary demand, it must be shown, as we have seen, that it does not constitute a mere private debt, in respect of which the ordinary action of debt would be an available remedy, but that the only mode of obtaining payment is by recourse to a rate, the duty of making and levying which is, by statute or royal charter, imposed upon the defendants. The declaration need not state the precise amount due, as in the case of the prerogative writ of mandamus to enforce a judgment obtained against an officer of a corporation; but the plaintiff is at liberty to allege the existence of the debt generally, leaving it to the jury to find the precise amount for which the mandamus claimed is to issue, and when that amount is found by them, the mandamus forms part of the judgment in the action (c).

SECTION III.

ON THE AUTHENTICATION OF CONTRACTS.

Of the legal authentication of contracts.—In most countries, and under most systems of jurisprudence, certain forms and solemnities have been established for the purpose of binding men finally and conclusively to the truth and good faith of their acts and representations, and for the due authentication of contracts. The highest and most authentic contract known to the civil law was called a STIPULATION; it was entered into before a magistrate or public officer, through the medium of interrogatories and answers calculated to explain the nature and extent of the undertaking, to put the parties entering into it on their guard, and to show it to be their mature and deliberate act (a). A solemn contract of this nature could not afterwards be impeached, except on the ground of fraud or deceit, and could not by the civil law be released or discharged whilst executory, except by an equally solemn proceeding, conducted by question and answer before the magistrate or public functionary, called an ACCEPTILATION (b). The civil law did not consider the circumstance of the contract or undertaking being

(c) *Ward* v. *Lowndes*, 1 Ell. & Ell. 940; see C. L. P. Act, 1854, s. 69.

(a) "Nimirum leges Romanæ ex nudâ conventione neminem obligari voluerunt, ne qualecumque promissum, et sermo, sæpe inconsultus magis quam ex voluntate proficiscens, necessitate juris promittentem illigaret, et litium quoque, ut opinor, præcidendarum causâ; sed excogitata est conventio certo modo et formâ concipienda, celebrandaque, quam deliberati animi certum signum esse voluerunt, et ex quâ certo jure actio competeret, quam conventionem STIPULATIONEM dixerunt." *Vinnius*, lib. 3, tit. 16, p. 677; "STIPULATIONIS introducendæ ratio hæc una fuit, ut discerni posset, an promissio temere effusa an vero consulto concepta esset;" *Perezii* prælect. 2, p. 71.

(b) *Vin.* p. 677; Dig. lib. 45, tit. 1; Cod. lib. 8, tit. 38, 44; Dig. lib. 46, tit. 4; Inst. lib. 3, tit. 30; Pandect. lib. 50, tit. 17, art. 5, par *Pothier*, vol. 5, p. 254.

put into writing equivalent to the *verba solennia* or stipulation. The written promise, or acknowledgment, or note, amounted only to evidence of the fact or transaction, and might be avoided and rendered nugatory by extrinsic testimony; but, if the acknowledgment was made in the prescribed form before the public functionaries, it was at once conclusive, and no exception could afterwards be brought against it. By the intervention of a stipulation, the written contract at once ceased, the lesser security being merged in the greater (*c*). The continental nations, acting by analogy to the civil law, recognise in general two classes of contracts, of a superior and inferior nature, the one being public authentic acts ratified and confirmed before witnesses, or in the presence of a magistrate, or a notary public, or a registrar or judge; the others, private acts, which are entered into and arranged between the parties themselves, without witnesses, and without the ministry or authentication of any public officer. The publicly authenticated contract carries with it full credit; but the private act may be questioned and contradicted, and requires some cause or consideration for its compulsory fulfilment (*d*).

Contracts requiring authentication by a signed writing.—Contracts for the sale of interests in land.—By the 29 Car. 2, c. 3, s. 4, no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto (*e*) by him lawfully authorised. This refers to agreements not operating as an immediate transfer or conveyance of an estate or interest in land, but as contracts to make or execute a grant, or transfer, or conveyance, at some subsequent period (*f*). Agreements for leases and for the sale, assignment, or surrender of leasehold estates, being contracts for a grant or transfer of an estate or interest in land, are within this clause of the statute, and must consequently be authenticated by a signed writing (*g*). Where anything is to be done which substantially amounts to a sale or parting with an interest in land, the contract is within the statute (*h*). A grant of a right to shoot and take away game was held within the statute (*hh*). Where it was

(*c*) *Vinnius*, pp. 735, 736, 738; *Perez.* prælect. lib. 4, tit. 30; Cod. lib. 14, tit. 30, s. 14, ed. *Gothofred*, p. 238.

(*d*) "L'obligation *sans cause* ne peut avoir *aucun effet*;" Code Civile, Liv. 3, tit. 3, s. 4.

(*e*) The agent must be authorised to sign the contract, and sign it as binding the person interested, *Smith* v. *Webster*, 3 Ch. D. 49.

(*f*) Sugd. Vend. 94, n.

(*g*) *Anon.*, Ventr. 361; *Poulteney* v. *Holmes*, Str. 405.

(*h*) *Kelly* v. *Webster*, 12 C. B. 290; Willes, J., *Smart* v. *Jones*, 15 C. B. N. S. 717; 33 L. J. C. P. 156.

(*hh*) *Webber* v. *Lee*, 9 Q. B. D. 315.

agreed that the plaintiff should surrender her tenancy and prevail on her landlord to accept the defendant as tenant in her place, and that the defendant should then pay her for so doing 100*l.*, it was held that the contract amounted to a sale of an interest in land within the statute (*i*). And, generally, whenever the contract or promise sued upon forms part of one entire contract for an interest in land, it will fail to support an action, if it is not authenticated by writing (*k*), unless there has been a part performance of the agreement, in which case it may generally be enforced (*l*); for the Courts will not allow the Statute of Frauds to cover a clearly fraudulent act (*m*). In order to constitute a part performance the parties must have put themselves in a different position from that in which they would have been had there been no contract, as for instance when possession is accepted (*n*), or when a tenant expends money upon a farm (*o*), or pays an increased rent (*p*). And where it is evident that the parties have been pursuing a course of acting as if there were a contract, the Court will enforce such contract (*q*). Where a father verbally promised his daughter a house as a wedding present, and put her in possession, and he paid instalments to a building society in respect of it, and at his death there was still 110*l.* due to the society, it was held that the possession took the case out of the Statute, and that the 110*l.* must come out of the father's estate (*r*). The mere payment of purchase-money is not a part performance (*s*). Where the defendant served as housekeeper to the intestate, who had made but not attested a will, in which he left defendant a life estate in a farm, it was held there was no part performance sufficient to exclude the Statute (*t*). The above doctrine only applies to contracts in respect of land, or at all events does not apply to contracts of service (*u*).

Interests in land.—Contracts for the letting and hiring of furnished houses and lodgings, by the day, week, or month, are contracts for an interest in land, and must be authenticated by a signed writing, if the contract gives the party a right to any specific apartments (*v*); but a contract to receive a man into a

(*i*) *Cocking* v. *Ward*, 1 C. B. 868; 15 L. J. C. P. 245; but see *Angell* v. *Duke*, L. R. 10 Q. B. 174; *Pulbrook* v. *Lawes*, 1 Q. B. D. 284.

(*k*) *Hodgson* v. *Johnson*, E. B. & E. 689; 28 L. J. Q. B. 88; but see *Pulbrook* v. *Lawes*, *supra*.

(*l*) *Nunn* v. *Fabian*, L. R. 1 Ch. 35; 35 L. Chanc. 140.

(*m*) *Haigh* v. *Kaye*, L. R. 7 Ch. 439.

(*n*) *Dale* v. *Hamilton*, 5 Hare, 381; *Morphett* v. *Jones*, 1 Swanst. 172; *post*, p. 210; *Surcome* v. *Pinniger*, 3 D. M. & G. 571; *post*, p. 1125.

(*o*) *Mundy* v. *Jolliffe*, 5 Myl. & Cr. 167, *post*, p. 210.

(*p*) *Nunn* v. *Fabian*, *supra*.

(*q*) *Blackford* v. *Kirkpatrick*, 6 Beav. 232.

(*r*) *Ungley* v. *Ungley*, 5 Ch. D. 887, C. A.

(*s*) *Per* James, L. J., *Ex parte Hall*, 10 Ch. D. 619; *Clinan* v. *Cooke*, 1 Scho. & Leff. 40.

(*t*) *Alderson* v. *Maddison*, 7 Q. B. D. 174.

(*u*) *Britain* v. *Rossiter*, 48 L. J. 362, C. A., but see judgment of Thesiger, L. J.

(*v*) *Inman* v. *Stamp*, 1 Stark. 12; *Edge* v. *Strafford*, 1 C. & J. 391.

house and provide him with board and lodging generally, not giving him a right to any specific rooms, has been held not to be a contract for an interest in land (*x*). So a contract to receive a ship into a graving dock has been held not to be a contract for an interest in land (*y*). Agreements to furnish houses, entered into between a landlord and an intended lessee or tenant, where the occupation of the house forms the substance of the contract, and the furnishing of it is bargained for only in connexion with such occupation, are also contracts for an interest in land (*z*). If the agreement does not form part of a contract for the letting and hiring of a house, it is then, of course, only a sale and purchase of goods and chattels, and has nothing whatever to do with an interest in land.

Interest in land.—Agreements for the sale of a milk-walk, by which the plaintiff agrees to let the defendant into the occupation of premises, and the defendant agrees to pay rent, rates, and taxes, is a contract for an interest in land within the statute (*a*).

Interest in land.—Agreements to make alterations and repairs in buildings entered into between a landlord and an intended lessee or tenant, where the principal subject-matter of the agreement is the letting of the buildings, and the improvements and alterations are accessorial thereto and contracted for only in connexion with the lease, are contracts involving an interest in land within the statute, and cannot be enforced unless they are authenticated by writing (*b*). Thus, where the plaintiff, being possessed of a messuage and premises for the residue of a term, agreed to give up possession to the defendant for the residue, in consideration of the defendant's undertaking to do certain repairs to the premises, and the defendant, in pursuance of the agreement became tenant for the residue of the term, but neglected to fulfil his promise to repair the house, it was held that this was an agreement relating to an interest in land within the statute (*c*). But where a tenant in the actual occupation of a house under an existing demise orally agreed, in consideration that the landlord would put another story upon the house, to pay him 10*l.* per annum upon the cost of the erection, in addition to the rent, and the additional story was built, and the landlord brought his action for the increased payment, it was held that the want of a written

(*x*) *Wright* v. *Stavert*, 2 Ell. & Ell. 720; 29 L. J. Q. B 161.

(*y*) *Wells* v. *Kingston-upon-Hull*, L. R. 10 C. P. 402.

(*z*) *Vaughan* v. *Hancock*, 3 C. B. 766; 16 L. J. C. P. 1; *Simmons* v. *Simmons*, 12 Jur. 1.

(*a*) *Smart* v. *Harding*, 24 L. J. C. P. 76.

(*b*) *Vaughan* v. *Hancock*, 3 C. B. 766.

(*c*) *Buttemere* v. *Hayes*, 5 M. & W. 456; *Earl of Falmouth* v. *Thomas*, 1 Cr. & M. 89.

contract formed no objection to the action (*d*). A contract of this kind made by a tenant in the actual occupation and enjoyment of the land, and not forming part of the original contract of demise, seems to be a contract for work and labour and the supply of materials, rather than a contract involving an interest in land. And, where the defendant agreed to make good all damage done by his workmen in quarrying stone from the plaintiff's land, it was held that this was not an agreement respecting land within the statute (*e*).

Interest in land—Contracts for services in connexion with the transfer of an interest in land.—Where a lessee, who was restrained from assigning his lease without licence, agreed to assign the lease for 100*l.*, to be paid by the assignee, and to pay to his landlord 40*l.* out of the 100*l.* for a licence, and the licence being given, and the assignment executed, and the money received, he then refused to pay the 40*l.* on the ground that there was no written agreement, it was held that the landlord might recover the 40*l.* in an action for money had and received (*f*). So, where the plaintiff had made an oral agreement with one Emmanuel for the purchase of an estate for 600*l.*, and then agreed in writing with the defendant to sell him the bargain for 40*l.*, and the estate was afterwards at the plaintiff's request conveyed to the nominee of the defendant, it was held that the defendant was responsible for the payment of the 40*l.* (*g*). In these cases, the contract being executed, the action is in truth an action for a stipulated remuneration for services rendered. Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then, if that part of the contract has been executed, the fact of the whole contract not being in writing will not preclude an action on the other part founded on a promise to be performed after such execution; but one contract founded upon one consideration cannot be bi-sected so as to make a new contract and a new consideration out of one half (*h*). Where the defendant, having no interest in a public-house, agreed to get the plaintiff a lease of it, it was held that this was a contract for an interest in land within the statute (*i*).

Interest in land—Agreements concerning landmarks and boundaries.—If two occupiers of adjoining lands agree that a wall or fence shall be built by one of them as a boundary common to

(*d*) *Hoby* v. *Roebuck*, 7 Taunt. 157; 2 Marsh. 433; *Seago* v. *Deane*, 1 Moo. & P. 227; 4 Bing. 459.

(*e*) *Griffiths* v. *Jenkins*, 10 Jur. N. S. 207.

(*f*) *Griffith* v. *Young*, 12 East, 514, 515.

(*g*) *Seaman* v. *Price*, 1 Ry. & Mood. 195; *Green* v. *Saddington*, 7 Ell. & Bl. 503.

(*h*) *Hodgson* v. *Johnson*, E. B. & E. 689; 28 L. J. Q. B. 88.

(*i*) *Horsey* v. *Graham*, L. R. 5 C. P. 9; 39 L. J. C. P. 58.

both, and that the other shall pay his proportion of the expense, this is not a contract for an interest in land within the meaning of the statute (*k*), and need not consequently be authenticated by a signed writing.

Interest in land—Contracts respecting growing crops—grass—timber, &c.—An agreement for the sale and purchase of growing grass (*primæ vesturæ*), growing timber or underwood, growing fruit and hops, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land (*l*), as such things are not distinguishable from the land itself in legal contemplation until actual severance, and pass to the heir, and not to the executor (*m*); but *fructus industriales*, such as growing crops of turnips, potatoes, and corn, and the annual productions of the soil raised by the labour of man, which are seizable by the sheriff under a *fi. fa.*, and pass to the executor and not to the heir, are considered goods and chattels; and contracts for the sale of them are, from this their original nature, considered to be contracts for the sale of goods and chattels, and not of an interest in land, although they are to remain in the soil and derive a nutriment therefrom until they have arrived at maturity; and the mere licence to come upon the land for the purpose of gathering and securing the crop, which is incident to such a contract, is not a sale of an interest in land within the meaning of the statute (*n*). If fruit is sold at so much a bushel, and timber at so much a foot, with a view to its immediate severance from the soil, and delivery as a chattel to the vendee, the contract is not a contract for the sale of an interest in land, but for the sale of goods and chattels, "the produce of the trees when they should be cut down and severed from the freehold" (*o*). It is the same as if the parties had contracted for so much fruit already picked, or for so many feet of timber already felled (*p*). But, where a man agrees to hire the land and take the crops growing thereon at a valuation, and to pay a certain sum for work and labour and materials expended in

(*k*) *Stuart* v. *Smith*, 7 Taunt. 158.

(*l*) *Crosby* v. *Wadsworth*, 6 East, 610; *Carrington* v. *Roots*, 2 M. & W. 248; *Scorell* v. *Boxall*, 1 Y. & J. 398; Sugd. Vend. ch. 3, sec. 2; *Petch* v. *Tutin*, 15 M. & W. 115.

(*m*) *Rodwell* v. *Phillips*, 9 M. & W. 504; *Waddington* v. *Bristow*, 2 B. & P. 455.

(*n*) *Parker* v. *Staniland*, 11 East, 362; *Warwick* v. *Bruce*, 2 M. & S. 208; *Mayfield* v. *Wadsley*, 3 B. & C. 357; 5 D. & R. 224; *Evans* v. *Roberts*, 8 D. & R. 614; 5 B. & C. 829; *Watts* v. *Friend*, 10 B. & C. 446; *Dunne* v. *Ferguson*, 1 Hayes, 540; growing crops are not however goods and chattels within the Bills of Sale Act until severed, see *Brantom* v. *Griffiths*, 1 C. P. D. 349; 2 C. P. D. 212; *Ex parte National Mercantile Bank*, 16 Ch. D. 104; they will pass in a will under the words farming stock, see *In re Roose*, 17 Ch. D. 696.

(*o*) *Smith* v. *Surman*, 9 B. & C. 568; *Marshall* v. *Green*, 1 C. P. D. 35.

(*p*) Lord Abinger, *Rodwell* v. *Phillips*, 9 M. & W. 505; Rolfe, B., *Washbourne* v. *Burrows*, 16 L. J. Exch. 266; 1 Exch. 115.

getting the lands ready for tillage, this is an entire contract for an interest in land; and the growing crops cannot in such a case be treated as goods and chattels (*q*).

Where a contract was entered into for the sale of a crop of corn on the land and the profit of the stubble afterwards, and the vendor was to have liberty for his cattle to run with the purchaser's, and the purchaser was to have some potatoes growing on the land and whatever lay grass was in the fields, and was to harvest the corn and dig up the potatoes, and the vendor was to pay the tithe, it was held that this was not a contract for any interest in land, but a sale of goods and chattels as to all but the lay grass; and, as to that, a contract for the agistment of the purchaser's cattle (*r*). If the contract is within the 4th section of the statute as a contract for the sale of an interest in land, it must be authenticated by writing; and, if it does not fall within that section, but within the 17th, as a contract for the sale of goods and chattels, there must still be writing, unless the value of the subject-matter of the contract does not amount to 10*l.*, or the growing produce has been severed and delivered, or earnest has been given, or a part payment made, or there has been a part acceptance and receipt (*s*).

Authentication of executory contracts for the sale of goods or chattels.—By the 17th section of the Statute of Frauds, no contract for the sale of any goods, wares, and merchandise for the price of 10*l.* sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised. This section was held not to extend to contracts for the making and manufacture of goods, *i.e.*, contracts to make and complete and deliver at some subsequent period goods not in existence, and consequently not capable of delivery or of part acceptance at the time of the making of the contract, such as contracts to build a ship, or make a chariot, &c., and which were considered to be contracts for work and labour and the supply of materials, rather than contracts of sale (*t*); whereupon the 9 Geo. 4, c. 14, s. 7, was passed, which extends the provisions of the Statute of Frauds respecting the sale of goods to all contracts for the sale of goods of the value of 10*l.* and upwards, "notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made,

(*q*) *Earl of Falmouth* v. *Thomas*, 1 Cr. & M. 89; *Harvey* v. *Grabham*, 5 Ad. & E. 62.

(*r*) *Jones* v. *Flint*, 10 Ad. & E. 573.

(*s*) *Marshall* v. *Green*, 1 C. P. D. 35.

(*t*) *Groves* v. *Buck*, 3 M. & S. 178.

procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof and rendering the same fit for delivery" (*u*). The statute applies only to executory contracts for the sale of goods and chattels, where the party sought to be charged as the purchaser has not accepted or received the goods. If the goods have been delivered to, and received by, the buyer, the latter cannot of course resist payment of the price on the ground that there is no memorandum in writing of the contract (*v*). The two sections of these statutes are to be read together; and the consequence is, that the word "value" in the last-named, is substituted for the word "price" in the first-named, statute (*x*).

Contracts for the sale of fixtures and shares.—Contracts for the sale of fixtures are not within the operation of the Statute of Frauds, inasmuch as they are not goods and chattels within the meaning of the statute, nor do they constitute, although annexed to the freehold, an interest in land (*y*). Railway shares also, and shares in the profits of a mine, are neither interests in land, nor are they goods and chattels; and contracts for the purchase and sale of them are not, consequently, within the statute, and do not require to be authenticated by writing (*z*); but the transfer of the share in fulfilment of a contract of sale must, in general, be made in writing or by deed. If each shareholder in a mine has a joint interest in the land itself, that interest cannot pass except in the mode prescribed by the 4th section of the Statute of Frauds; but, if each shareholder has merely a right to a divisible proportion of the profits of the adventure, the case is not within the statute (*a*).

Promises by executors and administrators.—By the 4th section of the Statute of Frauds, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. We have already seen (*b*), that the promise of an executor or administrator to pay the debt of his testator or intes-

(*u*) *Lee* v. *Griffin*, 1 B. & S. 272; 30 L. J. Q. B. 252.

(*v*) *Scarle* v. *Keeves*, 2 Esp. 598; *Mavor* v. *Pyne*, 11 Moore, 6; *Teal* v. *Auty*, 2 B. & B. 100.

(*x*) *Harman* v. *Reeve*, 18 C. B. 595.

(*y*) Parke, B., 1 C. M. & R. 275; *Hallen* v. *Runder*, *ib.* 266; 3 Tyr. 959; *Lee* v. *Risdon*, 7 Taunt. 191; Parke, J., 2 Sc. 249; *Pinner* v. *Arnold*, 1 Tyr. & Gr. 1; *Lee* v. *Gaskill*, 1 Q. B. D. 700.

(*z*) Parke, B., 6 M. & W. 214; *Humble* v. *Mitchell*, 11 Ad. & E. 205; *Bradley* v. *Holdsworth*, 3 M. & W. 422; *Tempest* v. *Kilner*, 3 C. B. 249; *Bowlby* v. *Bell*, *ib.* 284.

(*a*) *Watson* v. *Spratley*, 10 Exch. 243; *Powell* v. *Jessop*, 18 C. B. 354.

(*b*) *Ante*, p. 4.

tate is a mere *nudum pactum*, and does not impose any personal liability upon the latter, or make him chargeable in his own right, unless there is some consideration for the promise. And the putting of the promise into writing pursuant to the statute does not do away with the necessity of a consideration; "for the statute was made for the relief of personal representatives, and did not intend to charge them further than by common law they were chargeable" (*c*).

Promises to answer for the debt, default, or miscarriage of another.—The Statute of Frauds further enacts (s. 4), that no action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. This clause does not apply to the case where a party giving a guarantee is himself liable to the demand which he is purporting to guarantee; it must be exclusively the debt, default, or miscarriage of another (*d*). But it applies to a promise to be answerable for a tortious act as well as a breach of contract; such as a promise to the lender of a horse to be answerable for the safe riding and re-delivery of it by the borrower, or a promise to the owner of a horse injured by an act of trespass, to make good the damage on condition that he would not sue the trespasser (*e*). But it has been held that the statute applies only to promises made to the person to whom another is answerable (*f*), and that it must be a promise to answer for a debt of, or a default in some duty by, that other person towards the promisee (*g*), and, therefore, that a promise by B. to indemnify A. against all liability, if he would become bail for the appearance of C. to answer a charge of misdemeanor, is not a promise to answer for the debt or default of another within the statute, since no debt or duty was owing from C. to A. (*h*). On the other hand, a promise to indemnify another from the consequences of becoming bail for a third person in a civil action has been held to be within the statute, a decision which is to be supported, if at all, on the ground that the person bailed is legally bound to indemnify his bail by surrendering or paying the debt (*i*). There can be no

(*c*) *Rann* v. *Hughes*, 7 T. R. 350, n.

(*d*) *Orrell* v. *Coppock*, 26 L. J. Ch. 269; *Couturier* v. *Hastie*, 22 L. J. Ex. 97.

(*e*) *Birkmyr* v. *Darnell*, Raym. 1085; Salk. 28, n. b.; 6 Mod. 249; *Kirkham* v. *Marter*, 2 B. & Ald. 613.

(*f*) *Eastwood* v. *Kenyon*, 11 Ad. & E. 446.

(*g*) *Hargreaves* v. *Parsons*, 13 M. & W. 570; *Thomas* v. *Cook*, 8 B. & C. 728; *Reader* v. *Kingham*, 13 C. B. N. S. 344; 32 L. J. C. P. 108.

(*h*) *Cripps* v. *Hartnoll*, 4 B. & S. 414; 32 L. J. Q. B. 381; *Wildes* v. *Dudlow*, L. R. 19 Eq. 198.

(*i*) *Green* v. *Cresswell*, 10 Ad. & E. 453; but see *Batson* v. *King*, 4 H. & N.

suretyship unless there be a principal debtor, who may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt to be guaranteed (*k*). A promise by one parishioner to indemnify another against the consequences of resisting a claim of tithe is not a promise to be responsible for the default of another, but a promise to pay what the promisee may lose by defending the promiser's interests in a suit (*l*). If A., in consideration that B. will stay proceedings in an action he has commenced against C., to recover a sum of money due to him from C., promises to pay that money, such promise is a promise to answer for the debt of another within the 4th section of the statute (*m*).

The operation of the statute is not confined to collateral undertakings to be answerable for a subsisting debt or duty; it extends to undertakings made before the debt accrues or the duty arises; and a guarantee, consequently, which a tradesman, before he sends out goods on credit, requires from a third party, because he does not like to trust the person for whose use the goods are intended, is within the statute, if the latter has been treated by the tradesman as his debtor (*n*). Thus, where the plaintiff, having commenced certain business for one Fox, refused to go on with it, without a promise by the defendant to pay the further expenses to be incurred, it was held that this promise was within the statute (*o*); and, where the defendant verbally promised that, if the plaintiff would supply A. with iron and take A.'s acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and, not being in writing, could not be enforced, on the ground that a contract to give a guarantee is required to be in writing as much as a guarantee itself (*p*).

But the sale may be to one man, although the goods are to be delivered to another; and a person may promise to pay for goods supplied to, or for work done at his request or by his directions for a third party, as the real debtor, and not in the character of a surety; and, if he has been treated by the person who has furnished the goods, or done the work, as the party liable, and credit has been given to him, his promise or undertaking to pay is not a collateral promise to answer for the debt of another, and the case

739; 28 L. J. Ex. 327; and *Cripps* v. *Hartnoll*, 4 B. & S. 414; 32 L. J. Q. B. 381.

(*k*) *Lakeman* v. *Mountstephen*, L. R. 7 H. L. 17, *per* Ld. Selbourne, p. 24.

(*l*) *Adams* v. *Dansey*, 6 Bing. 506; 4 Moo. & P. 245.

(*m*) *Fish* v. *Hutchinson*, 2 Wils. 94.

(*n*) *Peckham* v. *Faria*, 3 Doug. 13; *Parsons* v. *Walter*, *ib.* 14, n. c.; *Matson* v. *Wharam*, 2 T. R. 80.

(*o*) *Barber* v. *Fox*, 1 Stark. 270.

(*p*) *Mallet* v. *Bateman*, L. R. 1 C. P. 163; 35 L. J. C. P. 40.

consequently is out of the statute (*q*). If two come to a shop, and one buys, and the other to gain him credit promises the seller, "if *he* does not pay you, *I* will," this is a collateral undertaking, void without writing by the statute. But, if he says, "Let him have the goods, I will be your paymaster," this is an undertaking as for himself; and he shall be intended to be the very buyer (*r*). If the person for whose use the goods are furnished is liable at all, or if his liability is made the foundation of a contract by another to be liable for the goods, the contract is a promise to indemnify, and is void if not in writing; but, if the parties do not contemplate the liability of a principal debtor, the promisor is primarily liable and the contract is not within the statute (*s*). Where the defendant, in consideration that the plaintiff, at the request of the defendant, would provide a workman with materials for his work, promised the plaintiff to pay him a reasonable sum for such materials out of such monies received by him as should become due to the workman in respect of the work, it was held that this was not a promise by a surety to answer for the debt or default of another, within the meaning of the statute, but an original independent contract (*t*). If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them is not a collateral promise to answer for the debt of another, inasmuch as the infant is not liable to pay for them, and cannot be indebted, by reason of his minority (*u*).

The contract of a factor binding him in the terms implied by a *del credere* commission is not within the Statute of Frauds. The contract is the factor's own contract; and the debt of another comes in incidentally only as a measure of damages (*x*). Where the defendant, in consideration that the plaintiff would discharge a debtor out of custody, promised the plaintiff to pay him the debt, it was held that this was not a collateral promise to answer for the debt of another, the debt being extinguished by the discharge of the debtor (*y*). Where the defendant, in order to get rid of an incumbrance on his own property, or to obtain some direct personal advantage to himself, promises to pay the debt of another, the promise is not within the statute. And, if the original debt

(*q*) *Hargreaves* v. *Parsons*, 13 M. & W. 561; *Mountstephen* v. *Lakeman*, L. R. 7 Q. B. 196; 41 L. J. Q. B. 67.

(*r*) *Birkmyr* v. *Darnell*, 1 Salk. 27; 6 Mod. 250; *Watkins* v. *Perkins*, Raym. 224; *Seaman* v. *Price*, 1 C. & P. 586; 10 Moore, 34.

(*s*) Per Willes, J., *Mountstephen* v. *Lakeman*, L. R. 7 Q. B. 196; 41 L. J. Q. B. 67.

(*t*) *Andrews* v. *Smith*, 2 C. M. & R. 627; *Sweeting* v. *Asplin*, 7 M. & W. 173; *Gerish* v. *Chartier*, 1 C. B. 13.

(*u*) *Harris* v. *Huntbach*, 1 Bur. 373; *Duncombe* v. *Tickridge*, Aleyn, 94; 1 Wms. Saund. 211, d.

(*x*) *Wolff* v. *Koppell*, 5 Hill, N. Y. R. 458; *Couturier* v. *Hastie*, 8 Exch. 56.

(*y*) *Goodman* v. *Chase*, 1 B. & Ald. 297; *Butcher* v. *Stewart*, 11 M. & W. 857; 12 L. J. Exch. 391; *Lane* v. *Burghart*, 1 Q. B. 937; *Bird* v. *Gammon*, 5 Sc. 213; 3 Bing. N. C. 883.

be discharged and extinguished by the substitution in lieu thereof of a new contract by a third person to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another (z). Thus where a purchaser of goods, being unable to pay for them, transferred and delivered them to the defendant, and the latter promised the vendor to pay for them, it was held that this was a substitution of a new contract of sale and a new purchaser, in lieu of the original contract of sale; that the original purchaser was discharged from all liability in respect of the goods; and that, his debt being extinguished, the promise was not a promise to be answerable for the debt of another (a).

A contract or promise, although made concerning the debt or default of a third party, may yet be an original contract not within the statute (b). If the plaintiff has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods, or to part with his securities, upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the Statute of Frauds (c). Where the plaintiff had distrained upon his tenant for rent in arrear, and afterwards delivered up the goods and chattels to the defendants, for the use of the tenant, upon the faith of an undertaking by the defendants to pay the rent, it was held that the undertaking was not within the statute (d). The consideration need not appear in writing, see *post*, p. 649.

Agreements in consideration of marriage.—The 4th section of the Statute of Frauds further enacts that no action shall be brought whereby to charge any person upon any agreement made in consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. This does not extend to the marriage contract itself. Promises of marriage, consequently, are binding, though not reduced into writing and signed by the party sought to be charged thereon (e). But all promises and agreements made by one

(z) *Hodgson* v. *Anderson*, 5 D. & R. 746, 747; 3 B. & C. 855, 856; *Lacy* v. *M'Neile*, 4 D. & R. 7; *Taylor* v. *Hilary*, 1 C. M. & R. 743; 3 Dowl. 461.

(a) *Browning* v. *Stallard*, 5 Taunt. 450.

(b) *Walker* v. *Hill*, 5 H. & N. 419.

(c) *Barker* v. *Birt*, 10 M. & W. 61; *Barrell* v. *Trussell*, 4 Taunt. 117; *Meredith* v. *Short*, Salk. 25; *Castling* v. *Aubert*, 2 East. 325; *Walker* v. *Taylor*, 6 C. & P. 752; *Fitzgerald* v. *Dressler*, 7 C. B. N. S. 374; 29 L. J. C. P. 113.

(d) *Edwards* v. *Kelly*, 6 M. & S. 204; *Williams* v. *Leper*, 3 Burr. 1887; *Bampton* v. *Paulin*, 12 Moore, 497; *Houlditch* v. *Milne*, 3 Esp. 86; 1 Wms. Saund. 211 d., 211 e., ed. 1845.

(e) *Cork* v. *Baker*, 1 Str. 34; *Harrison* v. *Cage*, 1 Raym. 386.

person in consideration of the completion of a marriage by another are within the statute, and must be reduced into writing. The solemnization of the marriage does not take the case out of the operation of the statute (*f*). A letter written by a father, signifying his assent to the marriage of his daughter with J. S., and that he would give her a marriage-portion of 500*l.*, was held a sufficient promise in writing within the statute (*g*). A promise before marriage, by the husband to the wife, that, if she will forego a contemplated settlement, he will make the same provision for her by his will, is within the statute, and cannot be enforced if not made in writing (*h*).

Agreements not to be performed within a year.—The 4th section of the Statute of Frauds further enacts that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised. This extends to all contracts which are not by the terms of them to be fully and completely executed within a year. A part performance of the contract will not, consequently, take it out of the provisions of the statute. Thus, where a person had become a subscriber to the "Boydell Shakspeare," a work which was published in numbers, and could not be, and was not intended to be, completed within a year, and had taken and paid for several numbers as they came out, and then refused to continue his subscription and complete the set, it was held that an action could not be maintained against him for his subscription, as there was no written contract signed by him according to the statute (*i*). But, if the contract has been wholly performed on the part of the plaintiff, it is no answer that there is no memorandum in writing; for the statute does not apply where the consideration is executed (*k*). If the contract be for more than a year, the fact that it is defeasible within the year will not take it out of the operation of the statute (*l*). A contract whereby a coachmaker agrees to let a carriage for a term of five years, in consideration of an annual payment for the use of it, but which, by the custom of the trade, is determinable at any time

(*f*) *Caton* v. *Caton*, L. R. 1 Ch. 137; *ib.* 2 H. L. 127; 35 L. J. Ch. 292; 36 L. J. Ch. 886.

(*g*) *Countess of Mountacue* v. *Maxwell*, 1 Str. 236; *Bird* v. *Blosse*, 2 Ventr. 361; Bac. Abr. Agreements (C) 3.

(*h*) *Caton* v. *Caton*, L. R. 1 Ch. 137; *ib.* 2 H. L. 127; 35 L. J. Ch. 292; 36 L. J. Ch. 886; but see *Williams* v. *Williams*, 37 L. J. Ch. 854.

(*i*) *Boydell* v. *Drummond*, 11 East, 154, 158; *Sweet* v. *Lee*, 4 Sc. N. R. 90; *Roberts* v. *Tucker*, 3 Exch. 632.

(*k*) *Knowlman* v. *Bluett*, L. R. 9 Ex. 307.

(*l*) *Dobson* v. *Collis*, 1 H. & N. 84.

within that period, on payment of a year's hire, is an agreement not to be performed within a year, within the meaning of the statute (*m*). So also is a contract for a year's service to commence on a day subsequent to the making of the contract; for a contract which extends one minute beyond the time pointed out by the statute falls within its prohibition (*n*). But a contract or general hiring for one year from the time of the making of the contract, and so on from year to year so long as the parties shall respectively please, has been held not to extend beyond the time limited by the statute, and is not consequently within the provisions of the 4th section (*o*).

Where the defendant entered the service of the plaintiff on the terms that if he should leave the employment he should not carry on the same sort of business within five miles, it was held that the agreement was *primâ facie* not to be performed within a year (*p*).

The statute does not extend to contracts which are to be performed upon the happening of some uncertain event, and which consequently may or may not be completed within a year. Thus it has been laid down that, "where the agreement is to be performed upon a contingency, and it does not appear, in the agreement, that it is to be performed after a year, a note in writing is not necessary, for the contingent and uncertain event might happen within the year; but, where it appears, by the whole tenor of the agreement, that it is to be performed after the year, a note is necessary" (*q*). An agreement, therefore, to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years, for it might have happened within a year (*r*). So too a verbal promise, founded upon a good consideration, to leave the plaintiff a legacy of a certain amount, has been held to be binding (*s*). And where an oral promise was made to pay so much money on the return of a ship, which did not happen for two years, it was held that the promise was not within the statute, for the ship might have returned within the year, though by accident it happened that it did not (*t*). Neither does the statute apply where the contract is wholly executed, or intended to be so, by one

(*m*) *Birch* v. *The Earl of Liverpool*, 9 B. & C. 392.

(*n*) *Braccgirdle* v. *Heald*, 1 B. & Ald. 722; *Snelling* v. *Lord Huntingfield*, 1 C. M. & R. 25; see *Cawthorn* v. *Cordrey*, 13 C. B. N. S. 406; 32 L. J. C. P. 152.

(*o*) *Beeston* v. *Collyer*, 12 Moore, 552; 4 Bing. 309; *Giraud* v. *Richmond*, 2 C. B. 835.

(*p*) *Davy* v. *Shannon*, 4 Ex. D. 81, *per* Hawkins, J.

(*q*) *Wells* v. *Horton*, 12 Moore, 182, 183; 4 Bing. 43, 44; *Smith* v. *Neale*, 2 C. B. N. S. 67; 26 L. J. C. P. 143.

(*r*) *Peter* v. *Compton*, Skin. 353; Holt, 326; *Smith* v. *Westall*, 1 Raym. 316.

(*s*) *Ridley* v. *Ridley*, 34 L. J. Ch. 462.

(*t*) *Anon.*, Salk 280; *Fenton* v. *Emblers*, 3 Burr. 1282. W. Bl. 353.

of the parties thereto, within the year, although there are some acts to be done by the other party beyond the prescribed limit. Thus, where a landlord agreed to lay out 50*l.* in improvements upon the demised premises, and the tenant agreed to pay 5*l.* per annum for the remainder of his term, of which several years were then unexpired, in addition to the reserved rent, and the 50*l.* was expended within the year, and the landlord afterwards brought his action for the arrears of the 5*l.*, it was held that he was entitled to recover, though the agreement had not been put into writing and signed (*u*).

Requisites of the written memorandum of the contract.—If one person signs and forwards to another a written proposal, and this proposal is accepted and acted upon by the party to whom it is sent, there is a sufficient memorandum of the contract to satisfy the 4th section of the Statute of Frauds, and charge the sender, provided the terms of the contract can be ascertained from the written proposal construed in connexion with the surrounding circumstances (*x*). A letter making an offer or tendering certain terms for acceptance may be interpreted by the aid of other letters between the same parties referring to the same subject-matter for the purpose of establishing the terms of a contract within the 4th section of the statute (*y*), provided no extrinsic evidence is required to connect them (*z*). And indeed any printed papers or communications in writing which may have passed between the parties, forming on the face of them part of one connected transaction, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement" (*a*). But the names of the parties and the terms of the contract must appear from a comparison of the writings themselves; and they must manifestly refer to the same contract and transaction, and must not be contradictory to each other (*b*). It has also been held that parol evidence might be admitted to identify an unsigned agreement as being the one referred to in a signed minute in a minute-

(*u*) *Donellan* v. *Read*, 3 B. & Ad. 906; *Cherry* v. *Heming*, 4 Exch. 631; *Mavor* v. *Pyne*, 11 Moore, 2.

(*x*) *Smith* v. *Neale*, 2 C. B. N. S. 67; 26 L. J. C. P. 143; *Reuss* v. *Picksley*, L. R. 1 Ex. 342; 35 L. J. Ex. 218; *Peek* v. *The North Staffordshire Railway Company*, 32 L. J. Q. B. 241; *Warner* v. *Willington*, 3 Drew. 523; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 143; 28 L. J. Ex. 122; *Bird* v. *Blosse*, 2 Ventr. 361. Ld. St. Leonards, *Ridgway* v. *Wharton*, 6 H. L. C. 293.

(*y*) *Peek* v. *The North Staffordshire Railway Company*, 32 L. J. Q. B. 241; *Ridgway* v. *Wharton*, 6 H. L. C. 238; 27 L. J. Ch. 46.

(*z*) See *Chapman* v. *Callis*, 9 C. B. N. S. 769; 30 L. J. C. P. 241; *Peek* v. *North Staffordshire Railway Company*, 32 L. J. Q. B. 241.

(*a*) *Bird* v. *Blosse*, 2 Ventr. 361; *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; *Coe* v. *Duffield*, 7 Moore, 252; *Stead* v. *Liddard*, 8 *ib.* 2; *Baumann* v. *James*, L. R. 3 Ch. 508.

(*b*) *Kenworthy* v. *Schofield*, 2 B. & C. 948; *Cooper* v. *Smith*, 15 East, 103; *Jackson* v. *Lowe*, 1 Bing. 9; *Smith* v. *Surman*, 9 B. & C. 561; *Williams* v. *Lake*, 2 Ell. & Ell. 349; 29 L. J. Q. B. 1.

book (*c*), or a receipt by the defendant for a deposit as being given in respect of the same subject-matter as an agreement signed only by the plaintiff (*d*); or a reference in a signed letter by the defendant to a memorandum signed by the plaintiff (*e*).

If two parties have entered into an agreement for the performance of particular acts or duties, it is not necessary to show that the memorandum of the agreement has been signed by both parties, in order to render the one who has signed it liable upon the contract. Thus, if an agreement has been made by word of mouth for the purchase and sale of an estate, and the purchaser signs a memorandum by which he agrees to buy the property for a certain sum from the vendor, and the vendor is ready to establish his title, and is willing and offers to convey the property to the purchaser, the latter cannot escape from his agreement to buy by saying that the vendor had signed no memorandum of the contract and was not himself liable upon it by reason of the statute (*f*). So, if a purchaser sends an order in writing signed by him for goods, which are selected and forwarded to him, and he then declines to receive them, it is no answer to an action for not accepting and paying for the goods, to say that there was no memorandum of the contract signed by the vendor (*g*). But, although it is not necessary that both parties should sign the memorandum, both parties must be specified either nominally or by a sufficient description or reference (*h*), unless the plaintiff has estopped himself from repudiating the contract (*i*). Thus, in the case of a bargain and sale of goods and chattels, it must appear from the memorandum signed by the purchaser that the plaintiff is the vendor; for, if that is left wholly uncertain, the memorandum will be insufficient (*k*). And, where a price is agreed upon at the time of the sale, it must be set forth on the face of the memorandum (*l*). So also before the Court will decree specific performance of a contract for sale of real property, it must be

(*c*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314.

(*d*) *Long* v. *Millar*, 4 C. P. D. 450, C. A.; see also *Shardlow* v. *Cotterell*, 20 Ch. D. 90.

(*e*) *Cave* v. *Hastings*, 7 Q. B. D. 125.

(*f*) *Hatton* v. *Gray*, 2 Ch. C. 164; *Fowle* v. *Freeman*, 9 Ves. 351; *Seton* v. *Slade*, 7 Ves. 264; *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; 3 Scott, 238.

(*g*) *Egerton* v. *Mathews*, 6 East, 307; *Liverpool Borough Bank* v. *Eccles*, 4 H. & N. 143; 24 L. J. Ex. 122; *Allen* v. *Bennet*, 3 Taunt. 169.

(*h*) *Williams* v. *Lake*, 2 Ell. & Ell. 349; 20 L. J. Q. B. 1; *Sale* v. *Lambert*, L. R. 18 Eq. 1; *Commins* v. *Scott*, L. R. 20 Eq. 11; *Catlin* v. *King*, 5 Ch. D. 660; *Williams* v. *Jordain*, 6 Ch. D. 517.

(*i*) *Thomas* v. *Brown*, 1 Q. B. D. 714.

(*k*) *Champion* v. *Plummer*, 1 N. R. 252; *Graham* v. *Musson*, 5 Bing. N. C. 603; *Sarl* v. *Bourdillon*, 1 C. B. N. S. 195; 26 L. J. C. P. 78; *Vandenburgh* v. *Spooner*, L. R. 1 Ex. 316; 35 L. J. Ex. 201; *Potter* v. *Duffield*, L. R. 18 Eq. 4. But parol evidence may be given of the relative trades of the parties; and if from that it can be inferred with reasonable certainty which was the seller and which the buyer, that will be sufficient, *Newell* v. *Radford*, L. R. 3 C. P. 52; 37 L. J. C. P. 1.

(*l*) *Goodman* v. *Griffiths*, 1 H. & N. 576; as to the requisites of the memorandum of a contract of sale, see further, *post*, p. 915.

sufficiently described in the receipt or memorandum (*m*). Again, if the contract is a contract for the performance by the parties of mutual recurring acts and services from time to time, both must be bound by the contract, or neither can be made liable upon it (*n*), except in respect of acts done and services actually rendered. Thus, if a servant signs a memorandum of agreement by which he undertakes to serve his employer for more than a year, and enters upon the service, he is, nevertheless, not bound by his agreement to serve for a year, unless the memorandum is also signed by the employer; for, if the latter is not bound to employ for the term specified, the servant is not bound to serve (*o*); but in all other respects, as regards work actually done and services rendered, the servant would be bound by the terms of his signed writing (*p*).

In the case of a written memorandum of an agreement for a lease, if the memorandum, construed in connexion with other writings therein referred to and with surrounding circumstances, leaves the commencement or the duration of the term wholly uncertain, there is no binding contract (*q*). If a party writes a letter admitting the essential particulars of the contract, but containing a repudiation of the bargain upon bad or insufficient grounds, the letter will constitute a good memorandum of the contract within the statute (*r*). The agreement must be completed before the letter can be evidence of a binding contract (*s*). It was formerly held that the note or memorandum of a promise to answer for the debt, default, or miscarriage of another must disclose upon the face of it the consideration for the promise (*t*); but by the 19 & 20 Vict. c. 97, s. 3, "no such promise, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document." The consideration, therefore, may be supplied by oral evidence, but not the nature and extent of the promise itself (*u*).

(*m*) *Shardlow* v *Cotterell*, 18 Ch. D. 280; 20 Ch. D. 90, C. A.

(*n*) *Hoddesdon Gas Company* v. *Haselwood*, 6 C. B. N. S. 249; 28 L. J. C. P. 268.

(*o*) *Sykes* v. *Dixon*, 9 Ad. & E. 693.

(*p*) *Collis* v. *Botthamley*, 7 W. R. 87; *Souch* v. *Strawbridge*, 2 C. B. 808; 15 L. J. C. P. 172.

(*q*) *Bayley* v. *Fitzmaurice*, 8 Ell. & Bl. 679; *Fitzmaurice* v. *Bayley*, 27 L. J. Q. B. 143; *Clarke* v. *Fuller*, 16 C. B. N. S. 24; *Nesham* v. *Selby*, L. R. 13 Eq. 191; 41 L. J. Ch. 551; see however *Kusel* v. *Watson*, 11 Ch. D. 129.

(*r*) *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; 30 L. J. C. P. 154; *Wilkinson* v. *Evans*, L. R. 1 C. P. 407; 35 L. J. C. P. 224; *Buxton* v. *Rust*, L. R. 7 Ex. 279; 41 L. J. Ex. 173.

(*s*) *Munday* v. *Asprey*, 13 Ch. D. 855.

(*t*) *Powers* v. *Fowler*, 4 Ell. & Bl. 511.

(*u*) *Holmes* v. *Mitchell*, 7 C. B. N. S. 361; 28 L. J. C. P. 301.

In the case of a guarantee the name of the party to whom it is given must be stated on the face of the memorandum; for parol evidence is inadmissible to supply the omission (*x*). But, if the writing is not strictly a guarantee—if it is a general order or authority to any person who may choose to act upon it, authorising the supply of goods to a third party, and promising to pay for the goods so supplied—it may be sued upon as an original contract (*y*). A written admission by a purchaser to his agent that he had bought certain goods for him is a sufficient note or memorandum of the bargain between him and the vendor (*z*).

Of the signature to the memorandum.—If a man writes his name in the first person, as, "I, James Crockford, agree," &c. (*a*), or in the third person, as, "Mr. Stanley agrees" (*b*), this is a sufficient signature. But the mere insertion of the name of the contracting party in the body of a written contract is not of itself a sufficient signature. For, though the signature need not be placed in any particular part of the instrument, yet it must be so introduced as to govern or authenticate every material and operative part of it (*c*). Therefore, where the defendant Moore wrote instructions for a lease to the plaintiff in these words, "The lease renewed; Mrs. Stokes to pay the king's tax, also to pay Moore 24*l.* a-year half yearly; Mrs. Stokes to keep the house in good and tenantable repair," &c., it was held that Moore, by writing his own name in the body of the instructions, had not signed an agreement for the renewal of the lease within the intent and meaning of the statute (*d*). If the agreement concludes "as witness our hands," or contains any words showing that the names of the contracting parties were to be subscribed, there is no signing within the statute, unless the names of the parties are duly subscribed at the foot of the instrument (*e*).

The civil law did not require the signature of a party to a written contract, if the contract was in his own handwriting (*f*). But in our own law, if the defendant has written the whole contract with his own hand, without signing it as a concluded agreement, this is not sufficient, as the statute has made signing absolutely necessary for the completion of the contract (*g*). A party may under certain circumstances be bound by his signature, although

(*x*) *Williams* v. *Lake*, 2 E. & E. 349; 29 L. J. Q. B. 1.

(*y*) *M'Kune* v. *Joynson*, 5 C. B. N. S. 218; 28 L. J. C. P. 133.

(*z*) *Gibson* v. *Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5.

(*a*) *Knight* v. *Crockford*, 1 Esp. 190; *Taylor* v. *Dobbins*, 1 Str. 399; *Propert* v. *Parker*, 1 Russ. & Myl. 625; *Bleakly* v. *Smith*, 11 Sim. 150.

(*b*) *Lobb* v. *Stanley*, 5 Q. B. 574; *Johnson* v. *Dodgson*, 2 M. & W. 653.

(*c*) *Caton* v. *Caton*, L. R. 2 H. L. 127; *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Kronheim* v. *Johnson*, 7 Ch. D. 60.

(*d*) *Stokes* v. *Moore*, 1 Cox, 222, 223.

(*e*) *Hubert* v. *Treherne*, 3 M. & Gr. 743; 4 Sc. N. R. 486.

(*f*) Instit. Lib. iii. tit. 24.

(*g*) *Ithel* v. *Potter*, cited 1 P. Wms. 771.

he subscribed in form as a witness (*h*). "What, within the legal intent of the statute, will amount to a signing is the same question in equity as at law" (*i*). Where an offer was accepted by the defendant by telegram, and the instructions for the message were signed by the defendant, and the telegram received by the plaintiff contained the message with the names of the sender and receiver written by the telegraph clerk on the usual printed form, it was held that there was a sufficient signature within the statute (*k*). If a letter is signed and sent in an envelope containing a separate unsigned document by the same writer, and headed "supplement," and commencing, "I had quite omitted to tell you," but without any other reference to the letter or the letter to it, it was held that the unsigned document did not satisfy the Statute of Frauds (*l*). If a man writes his name in the vendor's order book, intending it as an order or authority to the vendor to send him certain goods specified therein with the prices, this is a sufficient signature (*m*). So, if he writes his name against an entry or memorandum in a book or ledger, or indorses his name on printed particulars of sale, printed handbills, or printed descriptions, specifying the goods and the price, with intent to denote that he has purchased the contents, this is a sufficient signature; and the name may be written in pencil as well as in ink (*n*). A man may sign also by his initials, or by his mark (*o*), or by a stamp (*p*); and it is quite immaterial upon what part of the paper the mark or signature is to be found. But the signature must, of course, be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon (*q*). It seems that it is not essential that the signature should be placed for no other purpose than to authenticate the contract, as where a chairman of a company signed a minute in the minute-book for the purpose of verifying the accuracy of the entry, but the entry was in terms an admission of the contract (*r*); but where shareholders signed as between themselves articles of association in which there was a clause stating that the plaintiff should be solicitor to the company, the signatures were held to have been made

(*h*) *Welford* v. *Beezely*, 1 Ves. senr. 6; *Gosbell* v. *Archer*, 2 Ad. & E. 508; 4 N. & M. 494.

(*i*) *Morison* v. *Turnour*, 18 Ves. 183.

(*k*) *Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*l*) *Kronheim* v. *Johnson*, 7 Ch. D. 60.

(*m*) *Sarl* v. *Bourdillon*, *ante*, p. 173; *Newell* v. *Radford*, 37 L. J. C. P. 1; L. R. 3 C. P. 52.

(*n*) *Geary* v. *Physic*, 5 B. & C. 234; 7 D. & R. 653.

(*o*) *Hubert* v. *Moreau*, 12 Moore, 219; *Phillimore* v. *Barry*, 1 Camp. 513; *Hyde* v. *Johnson*, 2 Bing. N. C. 780; *Jacob* v. *Kirk*, 2 Mood. & Rob. 221.

(*p*) *Bennett* v. *Brumfit*, 37 L. J. C. P. 25.

(*q*) *Coldham* v. *Showler*, 3 C. B. 320; *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Doe* v. *Pedgriph*, 4 C. & P. 312.

(*r*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314.

alio intuito, and that the plaintiff could not sue on the contract (*s*).

Signature by agents.—Where the note or memorandum is signed by an agent, it is not necessary that the agent should obtain his authority by any written instrument. It has been held, consequently, that the name of the party sought to be charged, printed by a printer in particulars of sale, or in any other printed paper embodying the terms of the contract, may be a signature by "a person lawfully authorised" within the meaning of the statute. If the party has recognised and adopted his printed name or signature—if, for instance, he has sanctioned or permitted the distribution of printed handbills, or printed particulars of sale, in which his name appears—there has been a signature by an agent duly authorised, upon the principle that the subsequent sanction or adoption of the printed name or signature is equivalent to an antecedent authority to the printer to print it (*t*). If an agent has signed a contract without authority, and the principal subsequently adopts the contract or ratifies the transaction, he is bound by the agent's signature (*u*). But the mere introduction of a name into a written or printed paper unrecognised by the party, and not brought home to him as having been written or printed by his authority is, of course, no signature within the meaning of the statute (*x*). A mere clerk or traveller of one party cannot be treated as an agent to bind the other, unless it be shown that he has received specific and express authority so to do (*y*). One of two or more partners may bind the others by signing the customary trading name of the firm to contracts for the purchase and sale of articles usually dealt in by the firm in the course of its business (*z*).

An auctioneer effecting a sale by auction, or an auctioneer's clerk taking down the biddings in the presence of the purchaser, is, during the continuance of the sale, but no longer (*a*), the authorised agent of the vendor and purchaser, and is enabled to sign for both or either of the parties, so as to satisfy the Statute of Frauds (*b*); and so is a broker who is employed to sell goods and who signs and delivers bought and sold notes (*c*). Neither of the contracting parties themselves can be the agent of the other

(*s*) *Eley* v. *Positive Government Security Co.*, 1 Ex. D. 20, C. A. 88.

(*t*) *Schneider* v. *Norris*, 2 M. & S. 288; *Maclean* v. *Dunn*, 1 Moo. & P. 766; *Saunderson* v. *Jackson*, 2 B. & P. 238.

(*u*) *Fitzmaurice* v. *Bayley*, 6 E. & B. 868; 26 L. J. Q. B. 114; *Bigg* v. *Strong*, 4 Jur. N. S. 983.

(*x*) *Hubert* v. *Turner*, 4 Sc. N. R. 506; 3 M. & Gr. 343.

(*y*) *Graham* v. *Musson*, 7 Sc. 769; *Graham* v. *Fretwell*, 4 Sc. N. R. 25; *Blore* v. *Sutton*, 3 Mer. 245: *Durell* v. *Evans*, 1 H. & C. 174; 31 L. J. Exch. 337; *Murphy* v. *Boese*, L. R. 10 Ex. 126.

(*z*) *Norton* v. *Seymour*, 3 C. B. 792.

(*a*) *Mews* v. *Carr*, 1 H. & N. 488; 26 L. J. Exch. 39.

(*b*) *Hinde* v. *Whitehouse*, 7 East, 568: *Emmerson* v. *Heelis*, 2 Taunt. 38; *White* v. *Proctor*, 4 Taunt. 209; *Bird* v. *Boulter*, 4 B. & Ad. 447.

(*c*) *Rucker* v. *Cammeyer*, 1 Esq. 104.

for such a purpose (*d*): the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person; and an auctioneer who signs the defendant's name by his authority cannot afterwards sue the latter upon the contract authenticated by such signature (*e*). If the signature was made by the auctioneer's clerk, the auctioneer may then sue upon the contract (*f*). The agency of an auctioneer, and his authority to bind the bidder by his signature, may be rebutted by showing a contract between the vendor and the bidder inconsistent with such agency. Thus, where goods were directed to be sold by auction by an executor, and the latter, before the sale, agreed with a legatee that he might bid at the sale any amount under 200*l*., and that the price should be set off against the legacy, and the legatee accordingly attended and became the purchaser of goods to the amount of 145*l*., and his name was written down on the conditions of sale by the auctioneer, it was held that the auctioneer was not, under the circumstances, an agent to bind the legatee so as to render the latter responsible for the non-payment of the price according to the terms of the conditions (*g*).

Unconscientious use of the Statute of Frauds.—Where by the fraud of one of the parties to a contract, it has not been reduced into writing, he will not be allowed to set up the statute (*h*).

Confirmation of promises made by infants.—Formerly promises made by infants could only be ratified by a signed writing; but now "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (*i*).

Executory promises requiring authentication by deed.—All unilateral or one-sided undertakings and engagements, where there is no mutuality of contract, and nothing is given or agreed to be done, and nothing has been done, as the consideration or inducement for the promise, must be authenticated by deed in order to enable the promisee to maintain an action for the non-performance of them. Thus, as we have already seen, if one man promises another to build him a house or to render him some certain service, and nothing is to be given or done by the promisee for

(*d*) *Wright* v. *Dannah*, 2 Campb. 203; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720; 40 L. J. Q. B. 312.

(*e*) *Farebrother* v. *Simmons*, 5 B. & Ald. 33.

(*f*) *Bird* v. *Boulter*, 4 B. & Ad. 443; 1 N. & M. 313.

(*g*) *Bartlett* v. *Purnell*, 4 Ad. & E. 792; *Lord Glengall* v. *Barnard*, 1 Kee. 769.

(*h*) *Lincoln* v. *Wright*, 4 D. & J. 16; *Haigh* v. *Kaye*, L. R. 7 Ch. 469; *Booth* v. *Turle*, L. R. 16 Eq. 182.

(*i*) 9 Geo. 4 c. 14, s. 5, repealed; 37 & 38 Vict. c. 62, s. 2.

the building or the service, no action lieth upon the promise; but, if the promise be made by deed, an action of covenant is maintainable upon the deed; and the consideration cannot then be inquired into (*ante*, p. 2).

Authentication of leases.—By the Act to amend the law of real property (8 & 9 Vict., c. 106, s. 3), it is enacted that a lease, required by law to be in writing (*k*), of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law unless made by deed. It has been held that this statute refers only to legal estates, so that an equitable interest, such as an equity of redemption, may be assigned by a note or memorandum in writing without being under seal (*l*). Nor does it apply to agreements to let tolls, which are regulated by the 3 Geo. 4, c. 126, and are valid if signed by the trustees, their clerk, or treasurer, notwithstanding they are not under seal (*m*). A lease not under seal for a term of less than three years, but giving a right to the lessee to continue to hold beyond three years, is invalid (*n*). But a lease by simple contract for a term exceeding three years in duration, though void as a lease, will operate as an agreement to grant a lease for the term specified (*o*), and may be specifically enforced (*p*); and a lease or agreement for a lease void as to the duration of the lease may regulate the terms upon which the tenancy subsists in other respects (*q*).

The authority of an agent to make or execute a deed for his

(*k*) By the Statute of Frauds (29 Car. 2, c. 3, s. 1), "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only, except (s. 2) all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at least of the full improved value of the thing demised;" and (s. 3) "no leases, estates, or interest either of freehold, or term of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered unless it be by DEED, or *note in writing* signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorised by writing, or by act and operation of law."

(*l*) *Stamers* v. *Preston*, 9 Ir. C. L. R. 355, C. P.

(*m*) Sect. 57, see *Shepherd* v. *Hodsman*, 18 Q. B. 316; 21 L. J. Q. B. 263.

(*n*) *Hand* v. *Hall*, 2 Ex. D. 318.

(*o*) *Bond* v. *Rosling*, 30 L. J. Q. B. 227; *Drury* v. *Macnamara*, 5 Ell. & Bl. 616; 25 L. J. Q. B. 5; *Tidey* v. *Mollett*, 16 C. B. N. S. 308; 33 L. J. C. P. 235.

(*p*) *Parker* v. *Taswell*, 2 De G. & J. 559; 27 L. J. Ch. 812.

(*q*) *Doe* v. *Bell*, 5 T. R. 471; *Richardson* v. *Gifford*, 1 Ad. & E. 52; *Arden* v. *Sullivan*, 14 Q. B. 832; 19 L. J. Q. B. 268; *Tooker* v. *Smith*, 1 H. & N. 732; *Tress* v. *Savage*, 4 Ell. & Bl. 43; 23 L. J. Q. B. 339.

principal must be under seal (*r*), except in the case of joint-contractors, one of whom, it has been held, may execute a deed for himself and the others without an authority under seal, provided he execute the deed for himself and the others *in the presence* of the others (*s*).

(*r*) *Steiglitz* v. *Egginton*, 1 Holt, 141.

(*s*) *Ball* v. *Dunsterville*, 4 T. R. 313.

CHAPTER II.

OF THE INTERPRETATION OF CONTRACTS.

SECTION I.

GENERAL PRINCIPLES OF INTERPRETATION.

Of the construction of contracts.—Every contract ought to be so construed that no clause, sentence, or word shall be superfluous, void, or insignificant. Every word ought to operate in some shape or other; *nam verba debent intelligi cum effectu ut res magis valeat quam pereat.* One part must be so construed with another that the whole may, if possible, stand; but a clause or particular sentence totally repugnant to the general intent of the contract is void, and must be rejected (*a*). The terms of the contract "are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like acquired a peculiar sense distinct from the popular sense of the same words" (*b*). Technical words of law, however, are to have their legal effect, unless from subsequent inconsistent words it is very clear that the parties used them in a sense different from their legal meaning; and the ordinary grammatical construction is to be followed, unless it is repugnant to the general context of the written instrument (*c*). If the parties have used technical terms and words of art, unintelligible to the ordinary reader, but having a clear, distinct, and definite meaning amongst mechanics or merchants, extrinsic evidence of such meaning may be given in aid of the interpretation of the deed, and to give the words their proper and known signification (*d*). Bad spelling is of no consequence, so long as it appears with certainty what is meant (*e*). But an agreement, the

(*a*) *Parkhurst* v. *Smith*, Willes, 332; *Solly* v. *Forbes*, 2 B. & B. 38; 4 Moore, 463; *Eyston* v. *Studd*, Plowd. 465; *Trenchard* v. *Hoskins*, Winch, 93; Domat's Civil Law, l. 1, tit. 1, s. 2, xi.; Shep. Touch. 88.

(*b*) Lord Ellenborough, *Robertson* v. *French*, 4 East, 137; *Mallan* v. *May*, 13 M. & W. 511; *Scott* v. *Bourdillon*. 5 B. & P. 213.

(*c*) *Lees* v. *Mosley*, 1 You. & C. 607; *Elliott* v. *Turner*, 2 C. B. 446.

(*d*) *Goblett* v. *Beechy*, 3 Sim. 24.

(*e*) *Hulbert* v. *Long*, Cro. Jac. 607; *Osborn's case*, 10 Co. 130, a. 2 Roll. Abr. 147.

terms of which are unintelligible (*f*), or too vague (*g*), cannot be enforced.

Evidence of surrounding circumstances.—To enable us also to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject-matter thereof and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. The law does not deny to the reader the same light and information that the writer enjoyed; he may acquaint himself with the persons and circumstances which are the subjects of the allusions and statements in the writing, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language to the things described (*h*). Where a lease had been made by the plaintiff to the defendant of part of a messuage, together with a piece of ground thereunto adjoining, which piece of ground was used as a yard, and beneath the yard was a cellar occupied by a third party under a lease previously granted to him by the plaintiff, and the occupant of the cellar continued to reside in it, and to pay rent to the plaintiff, for three or four years after the latter had demised the yard to the defendant, but, his lease having expired, and he having quitted the cellar, the defendant took possession of it, contending that the cellar had passed to him by the demise of the yard, the court held that parol evidence of the surrounding circumstances was admissible to show that it did not pass (*i*).

Where by deed a customer gave a charge to his bankers upon property mentioned in a schedule as "three leasehold houses in the Coity (*sic*) held under a lease of September 25," and the lease of that date only comprised one house; evidence, that the customer pointed out three houses to the banker, two of which were contained in another lease, was held admissible (*k*).

But where there is a written contract, the meaning of which as it stands is clear and unambiguous, former correspondence between the parties cannot be considered for the purpose of arriving at the intention of the parties, nor can words deleted from the document and initialed by the parties as deleted, be used for such purpose (*l*).

(*f*) *Guthing* v. *Lynn*, 2 B. & Ad. 232

(*g*) *Pearce* v. *Watts*, L. R. 20 Eq. 492; *Taylor* v. *Portington*, 7 De G. M. & G 328.

(*h*) *Shore* v *Wilson*, 9 Cl. & Fin. 555, 569, *Macdonald* v. *Longbottom*, 29 L. J. Q. B 256; 1 El. & Bl. 987; *Mumford* v. *Gething*, 29 L. J C. P. 110; 7 C. B. N. S. 305; *Carr* v. *Montefiore*, 5 B. & S. 408; 33 L. J. Q. B. 256.

(*i*) *Doe* v. *Burt*, 1 T. R. 703; *Press* v. *Parker*, 10 Moore, 158; Wigram on Evidence, 53, 76, 83, 3rd ed.; *Doe* v. *Hubbard*, 20 L. J. Q. B. 67.

(*k*) *In re Boulter*, 4 Ch. D. 241.

(*l*) *Inglis* v. *Butterby*, 3 Ap. Cas. 552.

Where the court has to find a contract in a correspondence, and not in one particular agreement formally signed, the whole of the correspondence which has passed must be taken into consideration (*m*).

Latent ambiguity.—From the admission of such evidence, and from bringing the words of the writing into contact with surrounding circumstances, a doubt sometimes arises as to the correct application of the words to the subject-matter of the contract and the objects professed to be described; this is called a LATENT AMBIGUITY, because it is not apparent upon the face of the contract, but arises from the application of the words to the objects to which they refer. "As this difficulty or ambiguity is introduced solely by the admission of extrinsic evidence of surrounding circumstances, it may be rebutted and removed by the production of further evidence of the identity of the objects described, in accordance with the ancient maxim, '*ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*'" (*n*). But the judgment of the court in expounding a deed must be simply declaratory of what is in the deed; it has to ascertain, not what the party intended, as contradistinguished from what the words express, but what is the meaning of the words he has used (*o*). And, "when the words of any written instrument are free from any ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, and common meaning of the words themselves, and evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible" (*p*).

Patent ambiguity.—Where, by an ambiguity patent on the face of the instrument, the intention of the parties is left in doubt, parol evidence is inadmissible to remove it (*q*). If a blank, for instance, has been left in a deed, or an important clause or word has been omitted by mistake, and it is doubtful what word was intended to have been used, the defect cannot be cured by extrinsic evidence of what was intended to have been inserted (*r*). Evidence merely explanatory of what the party has written is admissible,

(*m*) *Hussey* v. *Horne Payne*, 4 Ap. Cas. 311.

(*n*) Tindal, C. J., *Miller* v. *Travers*, 1 M. & Sc. 345; Bac. Max. 23; *Doe* v. *Needs*, 2 M. & W. 140; *Doe* v. *Hiscocks*, 5 M. & W. 368; *Raffles* v. *Wichelhaus*, 33 L. J. Ex. 160; 2 H. & C. 906.

(*o*) *Clayton* v. *Lord Nugent*, 13 L. J. Ex. 365; 13 M. & W. 200.

(*p*) Tindal, C. J., *Shore* v. *Wilson*, 9 Cl. & Fin. 565, 566; *Jones* v. *Newman*, 1 W. Bl. 60.

(*q*) Tindal, C. J., *Sanderson* v. *Piper*, 7 Sc. 415; 5 Bing. N. C. 431.

(*r*) *Baylis* v. *Church*, 2 Atk. 239; *Hunt* v. *Hart*, 3 Br. C. C. 311.

but not to show what he intended to have written (s). But, if the ambiguity arises simply from an imperfect expression of the meaning of the party, and can be resolved by reference to the general context of the instrument, when brought into contact with surrounding circumstances, the court will aid the imperfect expression in favour of the manifest intention, and will draw all such plain and reasonable inferences from the language and general context of the deed as appear to be necessary to give effect to the obvious meaning, and to carry into execution any matter or act clearly contemplated and intended to be done (t). If an important word has been omitted by mistake, and it clearly appears from the general context of the instrument, and the light thrown thereon by surrounding circumstances and the nature of the transaction, what the parties really meant and intended, the courts, in furtherance of the obvious intent, will read and construe the deed as if the word had been duly inserted (u). Where the name of the obligee of a bond was omitted in the obligatory part of an instrument, and it did not consequently there appear to whom the obligor had become bound, but it afterwards appeared, from the condition, who he was, the bond was held good by reference to the condition, and was construed as if no such clerical error had occurred (x). So, where the name of the grantor had been omitted in the operative part of a grant, but it clearly appeared from another part of the deed who he was, the deed was held to be valid, and was carried into full operation (y). A deed, therefore, will not, in such cases, be construed to be of no effect; *nam benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat* (z). The words "covenant" and "condition," when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention of the parties, be construed to mean contract or stipulation (a).

Figures and words at length.—The import and meaning of words at length cannot be contradicted or altered by figures. Where the figures and the words of a bill of exchange or promissory note, for example, disagree, the courts will give force to the words at length, in preference to the figures, "because a man is more apt

(s) *Divinatio non interpretatio est quæ omnino recedit a literâ.* Bac. Tracts, fol. 47; *Miller* v. *Travers*, 1 M. & Sc. 347; *Clayton* v. *Lord Nugent*, *Shore* v. *Wilson*, *supra*.

(t) *Sampson* v. *Easterby*, 9 B. & C. 505; 4 M. & R. 422; *Saltoun* v. *Houston*, 1 Bing. 433; 8 Moore, 546; *Bache* v. *Proctor*, 1 Doug. 383.

(u) *Coles* v. *Hulme*, 8 B. & C. 568; *Phipps* v. *Tanner*, 5 C. & P. 488; *Jarvis* v. *Wilkins*, 7 M. & W. 410.

(x) *Langdon* v. *Goole*, 3 Lev. 21.

(y) *Say (Lord) and Sele's case*, 10 Mod. 46.

(z) Platt on Covenant, ch. 2; Bac. Abr. (Covenant); *Fazakerly* v. *M'Knight*, 6 Ell. & Bl. 805; 26 L. J. Q. B. 30.

(a) *Hayne* v. *Cummings*, 16 C. B. N. S. 421.

to commit an error with his pen in writing a figure than he is in writing a word" (*b*).

Repugnant and void limitations of liability.—If a man covenants in his own name for the performance of some particular act or duty, and then seeks by proviso to relieve himself from ALL LIABILITY upon the covenant, the proviso will be rejected as being repugnant to the covenant (*c*). If two persons make a grant by deed, and it is provided that the deed shall not charge one of the grantors, the proviso is void; for it restrains all the effect of the grant as against him (*d*). If a company authorises its agent to issue bills of exchange with restricted liability as regards the shareholders, such restriction of liability is repugnant and void (*e*). Where by indenture the defendants covenanted for themselves and their successors, churchwardens, &c., with the plaintiff, that they, the said churchwardens, &c., and their successors, would pay to the plaintiff a certain sum of money by instalments, but it was provided that nothing contained in the said indenture should be deemed, or construed to be, any personal covenant of, or obligation upon, the defendants, or should in anywise personally affect them, their goods, effects, or estates, but should be binding upon the churchwardens and overseers of the poor of the said parish, and their successors for the time being, it was held that, as the defendants could not covenant so as to bind their successors, the covenant was their own personal covenant, and that the proviso, being in direct contradiction to the covenant, and utterly inconsistent with any personal liability of any kind whatever upon it, must be rejected as repugnant (*f*). But a proviso limiting the liability without destroying it is valid (*g*).

Limitation of liability to a particular fund.—When a covenant has been entered into for the payment of money, a proviso by the same deed exonerating the covenantor from all liability upon the covenant is not nugatory, if a particular fund is charged with the payment of the money. In the case of covenants to pay an annuity, if the land of the covenantor is charged with the payment, a proviso exonerating the person and personalty of the grantor is good; and Lord Coke, in commenting upon s. 220, in Littleton, says, "It appeareth that when in a general grant the law doth give two remedies, the grantor may provide that the grantee shall not use one of them, and so leave the party to the other. But, where the grantee hath but one remedy, there that

(*b*) *Sanderson* v. *Piper*, 7 Sc. 415.
(*c*) Jenk. Cent. 96, pl. 86.
(*d*) Bro. Abr. CONDITIONS, pl. 238.
(*e*) *State Fire Ins. Co.*, *in re*, 32 L. J. Ch. 300.
(*f*) *Furnivall* v. *Coombs*, 6 Sc. N. R. 522; 5 M. & G. 736.
(*g*) *Williams* v. *Hathaway*, 6 Ch. D. 544.

remedy cannot be barred by any proviso; for such a proviso would be repugnant to the grant." Consequently a proviso restricting the liability, good at the beginning, may become repugnant and void, as, if a man by deed grants a rent for life issuing out of his land, with a proviso that it shall not charge his person, this is a good proviso; yet, if the rent is in arrear, and the grantee dies, his executors shall charge the person of the grantor in an action of debt; for otherwise they would be without remedy; and therefore the proviso is now become repugnant, and, by consequence, void (*h*). Covenants to pay out of a particular fund do not of necessity imply that the payment is not to be made, unless the fund is raised, and do not therefore make the contract conditional and contingent on the realization of the fund. Such a covenant is an absolute covenant to pay the money, unless there is an express limitation of the liability (*i*).

In the case of simple contracts, however, where the party has looked to the anticipated realisation of funds by projectors of a particular undertaking, and not to the personal liability of the parties with whom he has contracted, his claim is confined to the fund, and he cannot enforce payment from individuals; and, if the project miscarries, and funds are not realised, he has no claim upon anybody or for anything. When it is not said at whose option one of two alternatives is to take place, the rule of law is that the option is in the party who is to do the first act (*k*). Thus a loan for nine or six months gives the borrower the option (*l*). A lease for seven, fourteen, or twenty-one years without saying at whose option, is at the option of the lessee (*m*).

What words amount to a covenant.—No precise form of words is necessary to constitute a covenant. Whatever words are used by a party to a deed, if he intends that they shall operate as a covenant, he will be held liable (*n*). The words in a contract under seal, "I will be answerable," or "I will be accountable," to A. for 10*l*., or "I am content to give A. 10*l*. at Michaelmas," amount to a covenant to pay the money (*o*); and words used in the future tense, unconnected with precedent words of agreement, will in themselves be sufficient to constitute an express covenant (*p*). An action of covenant will lie on general words of contract and agreement contained in a deed, although the parties profess not

(*h*) *Sir Anthony Mildmay's case*, 6 Co. 41 b.

(*i*) *Bain* v. *Kirk*, 18 L. J. Q. B. 83; *Pilbrow* v. *Pilbrow's Co.*, 5 C. B. 472; *Sunderland Marine Ins. Co.* v. *Kearney*, 20 L. J. Q. B. 417.

(*k*) *Price* v. *Nixon*, 5 Taunt. 338.

(*l*) *Reed* v. *Kilburn Co-operative Soc.*, L. R. 10 Q. B., 265.

(*m*) *Dunn* v. *Spurrier*, 3 B. & P. 399.

(*n*) *Per* Ld. Cairns, L. J., *Isaacson* v. *Harwood*, L. R. 3 Ch. 225; 37 L. J. Ch. 209.

(*o*) 3 Leon. 119, pl. 169; *Brice* v. *Carre*, 1 Lev. 47; 1 Keb. 155.

(*p*) *Bret* v. *Cumberland*, Cro. Jac. 399.

to contract "by way of covenant," as where they "resolved and agreed, and did, by way of declaration and not of covenant, spontaneously and fully agree;" and Lord Eldon said it was nonsense to talk of agreeing and declaring (under seal) without covenanting (q). Where a lessee covenanted that he would plough, sow, manure, and cultivate the demised premises, "except the rabbit-warren and sheep-walk," it was held that, as the parties clearly meant by the exception that neither the warren nor the sheep-walk should be ploughed, the exception ought to be construed as a covenant that it should not be done, and that an action of covenant consequently was maintainable for the doing of it (r). So, when it was agreed that a lessee should have "*conveniens lignum non succidendo arbores*," it was held that the lessor might have an action of covenant against him on these words for cutting down the trees (s). Words of recital in a deed will constitute an agreement between the parties upon which an action of covenant may be maintained, where it appears to be the intention of the parties that they should do so (t). Thus, where a termor for ninety-nine years, if three lives should so long continue, recited his interest, and that one life was in being, and assigned his term, it was adjudged that this recital amounted to a covenant that the life continued (u). So the recital in a deed of a previous agreement to do a certain act amounts to a covenant in the deed for the performance of it; for the recital operates as a solemn confirmation of the "agreement and intent precedent" (x). But a recital does not necessarily imply a covenant; and whether it does so or not in each case depends on what is to be collected as the intention of the parties from the whole instrument (y). Thus where a marriage settlement contained a recital of an agreement that after-acquired property of the wife should be settled, and the corresponding operative part was a covenant by the husband alone, it was held that the covenant was not controlled by the recital, and was not binding on the wife (z). When there is an acceptance of a trusteeship under seal, that does not amount to a covenant to perform the duties of the office (a).

Words of proviso and condition may be construed as an

(q) *Ellison* v. *Bignold*, 2 J. & W. 510; *Wood* v. *Copper Miner's Co.*, 7 C. B. 906; *Sampson* v. *Easterby*, 9 B. & C. 514; *Courtney* v. *Taylor*, 6 M. & G. 851; 7 Sc. N. R. 765; *Williams* v. *Burrell*, 1 C. B. 429; *James* v. *Cochrane*, 21 L. J. Ex. 229; *Mason* v. *Cole*, 4 Exch. 379; *Farrall* v. *Hilditch*, 5 C. B. N. S. 853; 28 L. J. C. P. 221; *Marryat* v. *Marryat*, 28 Bea. 224; 29 L. J. Ch. 665; *Jackson* v. *North-Eastern Ry.*, 7 Ch. D. 573.

(r) *Duke of St. Albans* v. *Ellis*, 16 East, 532.

(s) March 9, pl. 22; Dy. 19, b. pl. (115); *Stevinson's case*, 1 Leon. 324.

(t) Gawdy, J., *Severn & Clarke's case*, 1 Leon. 122; *Aspdin* v. *Austin*, 5 Q. B. 683; *Lay* v. *Mottram*, 19 C. B. N. S. 479.

(u) *Holles* v. *Carr*, 3 Swanst. 648; 2 Freem. 3.

(x) *Barfoot* v. *Freswell*, 3 Keb. 465.

(y) *Ivens* v. *Elwes*, 24 L. J. Ch. 249.

(z) *Young* v. *Smith*, L. R. 1 Eq. 180.

(a) *Holland* v. *Holland*, L. R. 4 Ch. 449; 38 L. J. Ch. 398.

express covenant, when such a construction is necessary to give effect to the apparent intention of the parties (*b*). Thus, where a conveyance was made by the plaintiff of an incorporeal right to the defendant, provided that out of the first profits the defendant should pay the plaintiff 500*l*., it was held that an action of covenant might be maintained on these words of proviso for the non-payment of the money (*c*). Where a lease executed by the lessor and lessee contained a covenant on the part of the lessee to maintain and repair a farmhouse and premises, "the said farmhouse and buildings being previously put into repair" by the lessor, it was held that these words amounted to an absolute covenant on the part of the lessor to put the house into repair, and not merely to a qualification of the covenant of the lessee (*d*). So, where a lease was granted on condition that the lessee should keep and leave the demised premises at the end of the term in as good plight as he found them, or that he should not exercise thereon a particular trade or business (*e*), it was held that an action of covenant would lie for a breach of this condition. Where, however, the proviso or condition is by way of qualification of the covenant, or defeasance of the deed or of the estate and interest thereby created, and not in the nature of an agreement, as if a lease be granted, provided and on condition that the lessee collect and pay the rents of the other houses of the lessor, an action of covenant is not maintainable. If a lessee for years covenant to repair, "provided always and it is agreed that the lessor shall find great timber, &c.," a covenant is created on the part of the lessor to find the timber by reason of the word "agreed;" but, if the lessee had covenanted to repair provided the lessor found the timber, without the word "agreed," the proviso would not have amounted to a covenant on the part of the lessor, but to a qualification only of the covenant of the lessee (*f*).

Covenants by implication of law.—Where a lessee covenanted that he would at all times during the continuance of his lease fold his flock of sheep which he should keep upon the demised premises upon such parts where the same had been usually folded, it was held that this amounted to a covenant to keep a flock of sheep upon the premises, and that it would consequently be no answer to an action upon the covenant for the defendant to say that he kept no sheep, and therefore had none to fold (*g*). And, where a

(*b*) *Brooks* v. *Drysdale*, 3 C. P. D. 52.

(*c*) *Clapham* v. *Moyl*, 1 Keb. 842, 897.

(*d*) *Connock* v. *Jones*, 3 Exch. 233; 18 L. J. Ex. 204.

(*e*) *Hodson* v. *Coppard*, 30 L. J. Ch. 20; 29 Beav. 4.

(*f*) 1 Rolle Abr. 518; Bac. Abr. Cov. *Geery* v. *Reason*, Cro. Car. 128; *Simpson* v. *Titterell*, Cro. Eliz. 242; *Wolveridge* v. *Steward*, 3 M. & Sc. 566.

(*g*) *Webb* v. *Plummer*, 2 B. & Ald. 749.

landlord demised certain limestone quarries and lime-kilns to a tenant, who covenanted, amongst other things, that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and the repair of their houses, it was held that this amounted to a covenant to burn lime at such seasons, and that it was no defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (*h*). If two persons covenant together that it shall be lawful for the one to hold possession of the other's property for a certain time, the law infers therefrom an agreement that he shall not detain it for a longer time, but shall then give it up to the owner; if he detains it beyond that time, it is a breach of covenant (*i*). Where a debt is assigned with the usual power of attorney to sue in the assignor's name, there is an implied covenant by the assignor not to thwart the remedy of the assignee against such debtor (*k*).

Bonds and obligations.—No precise form of words is necessary to create a bond or obligation. Any memorandum in writing under seal, acknowledging a debt, or denoting the intention of the party to bind himself for the payment of a sum of money, will oblige him as effectually as the most formal words he can make use of—such, for example, as "I, A. B., have borrowed 10*l.* of C. D.," or "Memorandum that A. owes B. 10*l.*," or "I have agreed to pay J. S. 19*l.*;" for, although the words "*teneri et firmiter obligari*" are generally put into every common bond, yet, when any other words purport the same effect, and the same sense in writing, the law will construe them to have like efficacy. Every word which proves a man to be a debtor, if it be under seal, will charge him with the payment of the money (*l*). If no time is limited in a bond for the payment of money acknowledged to be due, such money is due immediately, and payable on demand. If it be for the performance of an act on the 29th of February next following, and the next February has only twenty-eight days, it has been said that the party is not bound to do the act until the next leap-year when February has twenty-nine days (*m*).

Dependent and independent covenants.—"There are," observes Lord Mansfield, "three kinds of covenants: first, such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received

(*h*) *Earl Shrewsbury* v. *Gould*, *ib.* 487.
(*i*) *Randall* v. *Lynch*, 12 East, 182.
(*k*) *Gerard* v. *Lewis*, 36 L. J. C. P. 173; L. R. 2 C. P. 305.
(*l*) *Core's case*, Dyer, 22, b.; *Bedow's case*, 1 Leon. 25; Bac. Abr. p. 804; *Sawyer* v. *Mawgridge*, 11 Mod. 218; 1 Rolle Abr. 146; *Watson* v. *Snead*, Vent. 238.
(*m*) 1 Leon. 101, pl. 132.

by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff; secondly, there are covenants which are conditional and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant; there is also a third sort of covenants, which are mutual conditions to be performed at the same time, and, in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act" (n).

Conditions precedent.—Representations and stipulations in a contract as to something future to be done often constitute conditions precedent to be performed by one party before any liability attaches to the other. Whether particular stipulations are to be conditions precedent or not depends upon the intention of the parties, to be gathered from the language of the particular instrument (o). Where a tenant covenanted to repair, the landlord, "finding, allowing, and assigning timber sufficient for such reparations to be cut and carried by the lessee," it was held that the finding and assigning the timber by the lessor was a condition precedent to the liability of the lessee to repair (p); but, if the landlord is ready and willing, and offers to find and allow the timber, there is a sufficient performance of the condition on his part (q). And, if the covenant has annexed to it a mere licence to take timber for the purpose of reparation, the licence does not amount to a qualification of the covenant, so as to exonerate the tenant from his liability to repair in case there should happen to be no timber on the demised premises fit for reparation (r). Whenever it appears to have been the intention of the parties that performance of one stipulation should not be a condition precedent to the performance of another, effect will be given to such intention (s); but, where the intention is to rely on a previous performance, and not on the remedy for non-performance, performance is a condition precedent (t). Where a landlord granted all the coal lying and being

(n) *Kingston* v. *Preston*, cited 2 Doug. 689: Tindal, C. J., *Stavers* v. *Curling*, 3 Sc. 754; *Thorpe* v. *Thorpe*, 1 Salk. 171; *Peters* v. *Opie*, 2 Saund. 350.

(o) *Havelock* v. *Geddes*, 10 East, 555; *Seegar* v. *Duthie*, 8 C. B. N. S. 45, 72; 30 L. J. C. P. 65.

(p) *Thomas* v. *Cadwallader*, Willes, 496; and see *Neale* v. *Ratcliffe*, 15 Q. B. 916.

(q) *Martyn* v. *Clue*, 18 Q. B. 681.

(r) *Dean & Chapter of Bristol* v. *Jones*, 28 L. J. Q. B. 201; 1 El. & El. 484.

(s) *Christie* v. *Borelly*, 7 C. B. N. S. 561; 29 L. J. C. P. 153; *Dodd* v. *Ponsford*, 6 C. B. N. S. 324.

(t) *Roberts* v. *Brett*, 18 C. B. 573; 6 C. B. N. S. 611; 28 L. J. C. P. 323; 34 ib. 241; 11 H. L. Cas. 337.

within and under certain premises, and the grantee covenanted to pay so much for every acre of coal found within or under the said premises, and to pay 40*l.* a year whether the whole of an acre should be gotten or not, it was held that the *finding* of coal was not a condition precedent to the landlord's right to receive the 40*l.* a year (*u*).

The word "upon" may mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the instrument (*x*). Where a singer engaged to be present for rehearsal six days before appearance but did not, it was held that this was not a breach of a condition precedent (*y*), as it did not go to the root of the contract; but where the plaintiff was, through illness, quite unfit to undertake the earlier performances promised, it was held that the defendant was excused from his part of the contract, as the plaintiff's inability to perform did go to the root of the matter (*z*).

Waiver of conditions precedent.—Where a stipulation in the nature of a condition precedent has been partially performed, it ceases to be available as a condition, and becomes a stipulation by way of agreement, for the breach of which compensation must be sought in damages (*a*).

Independent covenants and promises.—"If there be a day set for the payment of the money, or for the doing of the thing which one promises and agrees to do for another thing, and that day is to happen, or may happen, before the other thing can be performed, an action may be brought for the money before the thing be done; for it appears that the party relied upon his remedy upon the contract," and not upon a previous or concurrent performance (*b*). If in a contract of hiring and service it is stipulated that the hire shall be paid before the time appointed for the rendering of the service, there the servant may bring an action for the money before the service has been performed (*c*). So, if there are mutual covenants for the sale and purchase of an estate, and a fixed day is appointed for the payment of the purchase-money, and another and later day for the conveyance of the property, the money must be paid on the day appointed, although the purchaser has not got

(*u*) *Jowett* v. *Spencer*, 1 Exch. 649.

(*x*) *Reg.* v. *Humphery*, 10 Ad. & E. 335, 369.

(*y*) *Bertini* v. *Gye*, L. R. 1 Q. B. D. 183.

(*z*) *Poussard* v. *Spiers & Pond*, 1 Q. B. D. 410.

(*a*) *Behn* v. *Burness*, 3 B. & S. 753; L. J. Q. B. 204; *Pust* v. *Dowie*, 32 L. J. Q. B. 179; 5 B. & S. 20, 33.

(*b*) Holt, C. J., *Thorp* v. *Thorp*, 12 Mod. 461; *Parker* v. *Rawlins*, 12 Moore, 529; 4 Bing. 280; *Judson* v. *Bowden*, 1 Exch. 166; 17 L. J. Ex. 172; *Terry* v. *Duntze*, 2 H. Bl. 389; *Cutter* v. *Bower*, 11 Q. B. 973; *Dicker* v. *Jackson*, 6 C. B. 114.

(*c*) *Pool's case*, 1 Wms. Saund. 320, b.

the estate (*d*). Where a purchaser agreed to pay for goods, not on, but after, delivery, it was held that actual delivery was precedent to the right of the vendor to sue for the price, unless the defendant had refused to receive the goods, and by his own act had prevented the performance of the contract by the plaintiff (*e*). So, where a vendor agreed to deliver forthwith fifty tons of iron for the price of 9*l.* per ton, the price to be paid in cash in fourteen days, it was held that the delivery of the iron was a condition precedent to the payment of the price, and, the vendor not having delivered the goods within the fourteen days, that the defendant was discharged from liability (*f*). If a deed purports and professes to grant and convey an interest, the covenants of the grantee immediately relating to that interest, and founded on the grant thereof, are conditional and qualified, so that the liability of the grantee upon them is dependent upon the interest, or some portion thereof, being actually transmitted to him. But this is not the case with respect to the covenants of the grantor of that interest; his covenants are independent and unconditional; and he is consequently liable upon them, whether the interest he professes to convey does or does not pass (*g*).

Covenants founded on a mutuality of obligation and liability must be mutually binding upon the parties to them. If, therefore, one of several parties to a deed *inter partes* founded on mutual covenants neglects to execute the deed, the contract is not binding on the others who have executed it (*h*). And, if a deed of covenant *inter partes*, originally binding upon all, becomes ineffectual and inoperative as to one by matter *ex post facto*, such as bankruptcy, the deed is wholly void (*i*). Where there are mutual and dependent covenants on the part of directors of companies and subscribers to the capital thereof, and the directors do not execute the deed, the subscribers will not be responsible upon their covenants (*k*). But, where the covenant is not founded upon some interest to be created by deed, or upon a mutuality of obligation and liability, the general rule of law is that, where a party has a covenant made to him, and he in return is to make a covenant, he may sue on the covenant made to him, even though he himself has not executed the deed. Thus, where a mortgage deed containing cross covenants between mortgagee and mortgagor was executed by the

(*d*) *Sibthorp* v. *Brunel*, 3 Exch. 826; *Yates* v. *Gardiner*, 20 L. J. Ex. 327; *Porłage* v. *Cole*, 1 Wms. Saund. 319, h.; *Mattock* v. *Kinglake*, 10 Ad. & E. 50; *Spiller* v. *Westlake*, 2 B. & Ad. 157; *Walker* v. *Harris*, 1 Anstr. 245.

(*e*) *Ripley* v. *M'Clure*, 4 Exch. 357.

(*f*) *Staunton* v. *Wood*, 16 Q. B. 638.

(*g*) *Walter* v. *Dean, &c., of Norwich*, 1 Brownl. & Goldes. 21; Owen, 136; *Jones* v. *King*, 4 M. & S. 188; *Northcott* v. *Underhill*, 1 Raym. 388.

(*h*) *Antram* v. *Chace*, 15 East, 212; *Marsh* v. *Wood*, 9 B. & C. 665.

(*i*) *Kearsey* v. *Carstairs*, 2 B. & Ad. 726.

(*k*) *In re Dover, Hastings, &c.*, 18 Jur. 52.

mortgagee alone, it was held that the latter was, nevertheless, liable upon his covenants (*l*).

Implied stipulations.—If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he will do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative (*m*). But where two parties mutually agree for their mutual benefit that one shall be sole agent for the other to sell goods in a particular town, there is no implied condition that the business itself shall be continued (*n*).

Usual covenants.—It is a very frequent stipulation in an agreement for a lease that the lease shall contain all "usual covenants," and the Courts have had frequently to decide what is or is not a "usual covenant" Thus it has been held that covenants to pay rent (*o*), to repair (*p*), for quiet enjoyment (*q*), and to pay rates and taxes when net rent is fixed (*r*), are usual covenants. And, upon the other hand, that covenants not to underlet or assign (*s*), not to carry on a particular trade (*t*), are not "usual." In mining leases it has been held that a proviso for re-entry upon a forfeiture by bankruptcy or assignment (*u*), and a covenant that the lease should determine when the mines could not be worked to a profit (*x*) are not "usual"

Computation of time.—Whenever a person is allowed a specified number of months for the delivery of an abstract of title, the payment of a sum of money, or the performance of any particular act or duty, the month is understood to be a calendar and not a lunar month, unless it appears, from the general context of the contract, that a lunar month was intended (*y*). When time is to be computed from a particular day, or from the day of an act being done, or the happening of a particular event, such day is to be excluded from the computation; for our law rejects fractions of a day, and an act done in the compass of it is not referable to one portion of the day more than another, so that the act is not considered to be passed and done with until the day has passed.

(*l*) *Morgan* v. *Pike*, 14 C. B. 473.

(*m*) *Stirling* v. *Maitland*, 5 B. & S 840, 34 L. J. Q. B. 1, *McIntyre* v *Belcher*, 14 C. B. N. S. 654; 32 L. J. C. P. 254.

(*n*) *Rhodes* v. *Forwood*, 1 Ap Cas. 256.

(*o*) *Taylor* v. *Horde*, 1 Burr. 60.

(*p*) *Kendall* v. *Hill*, 6 Jur. N. S. 968

(*q*) Davidson's Precedents, vol. 5, pt. 1, p. 51, 3rd. ed.

(*r*) *Bennett* v. *Womack*, 7 B. & C. 627.

(*s*) Smith and Soden's Landlord and Tenant, 2nd ed. p. 87, *Hampshire* v. *Wickens*, 7 Ch. D 555, *Buckland* v. *Papillon*, L. R 2 Ch 67.

(*t*) *Propert* v. *Parker*, 3 Myl. & K. 280; and see *Van* v. *Corpe*, 3 Myl. & K. 269; *Doe* d *Marquis of Bute* v. *Guest*, 15 M. & W. 160

(*u*) *Hodgkinson* v. *Crowe*, L. R. 10 Ch. 622

(*x*) *Strelly* v. *Pearson*, 15 Ch. D. 113.

(*y*) *Lang* v. *Gale*, 1 M. & S. 111; *Jolly* v. *Young*, 1 Esp. 186, *Corkell* v. *Gray*, 6 Moore, 486; 3 B. & B 186.

When, therefore, goods were sold on the 5th of October to be paid for in two months, it was held that the day on which the contract was made was to be excluded from the computation, and that an action for the price could not be maintained until after the expiration of the 5th of December (z).

In considering whether, upon a contract to do an act or enter into an engagement at or for a definite time from a certain date, the time is to be reckoned exclusively or inclusively of the last day, it is impossible to lay down any fixed rule; each case must depend on its own circumstances and subject-matter (a). But in general the last day is to be included. Thus, where a lease was granted for twenty-one years from the 25th of March in a particular year, the lease was held to continue until the end of the 25th of March of the last year (b). So, where a bankrupt was to be protected from the 16th until the 29th of July, it was held that the whole of the 29th was included (c). So, where goods were sold to be paid for in two months' time, it was held that the first day, the day of the sale, was excluded, and the last day included (d). And where a patent contained a proviso that the specification was to be filed within one month's time next after the date thereof, the day on which the letters patent were granted was held to be excluded (e). Again, where a security not to do a particular thing was to be given within six months from a testator's death, the last day of the six months was held to be included (f). And, where by a policy of insurance goods were insured against fire from the 14th of February until the 14th of August, it was held that the whole of the latter day was within the protection of the policy (g).

Of the interpretation of contracts made in one country and enforced in another.—All contracts made in one country concerning land and houses and immovable property situate in another country must be interpreted according to the law of the country in which the property is situate, the "*lex loci rei sitæ,*" and not by the "*lex loci contractûs,*" or the law of the country where the contract is made (h). A contract or settlement, therefore, made in consideration of marriage, which deals with heritable property situate in Scotland will be construed in England according to the law of Scotland (i). But a contract of marriage made in Scotland

(z) *Webb* v. *Fairmaner*, 3 M. & W. 473; *Young* v. *Higgon*, 6 *ib.* 49; *Mercantile Marine Insurance Co.* v. *Titherington*, 34 L. J. Q. B. 11.

(a) *Pugh* v. *Duke of Leeds*, 2 Cowp. 714.

(b) *Ackland* v. *Lutley*, 9 Ad. & E. 879.

(c) *Bellhouse* v. *Mellor*, 4 H. & N. 116; 28 L. J. Ex. 141.

(d) *Webb* v. *Fairmaner*, 3 M. & W. 473.

(e) *Watson* v. *Pears*, 2 Camp. 294.

(f) *Lester* v. *Garland*, 15 Ves. 248.

(g) *Isaacs* v. *The Royal Insurance Co.*, L. R. 5 Ex. 296; 39 L. J. Ex. 189.

(h) Story's Confl. of Laws, ss. 424, 428.

(i) *Duncan* v. *Cannan*, 23 L. J. Ch. 265.

in which trusts were declared in English form as to English real property, and in Scotch form as to Scotch personalty, was construed as to the English property by English law (*k*). But contracts in general receive their interpretation either from the law of the country in which the contract is made, the "*lex loci contractûs*," or the law of the country in which the contract is to be performed (*l*). The *lex loci contractûs* generally prevails in all that relates to the legal validity of the contract, the "*vinculum obligationis*;" and the law and custom of the place of performance in all that relates to the fulfilment of the contract (*m*). If no place of performance is specified on the face of the contract, the *lex loci contractûs* will determine the rights that are acquired on the one side, and the liabilities incurred on the other. If the contract is valid by the law of the country where it is made, it is valid everywhere, unless it is *contra bonos mores*, or is a contract for the doing of a thing which is directly prohibited and forbidden in, or contrary to the public policy of, the country where the contract is sought to be enforced; for, when we come to remedies, they must be pursued by the means which the law points out in the place where the remedy is sought to be obtained (*n*). "So much of the law of the country where the contract is made," observes Tindal, C. J., "as affects the rights and merits of the contract, all that relates '*ad litis decisionem*,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*,' is taken from the *lex fori* of that country where the action is brought" (*o*).

The rule governing the interpretation of a contract made in one country, to be performed wholly or partly in another, is, that the law of the country where the contract is made governs as to the nature of the obligation and the interpretation of it, if the parties to the contract are either subjects of the power there ruling, or as temporary residents owe that power a temporary allegiance (*p*). But a contract between an Englishman domiciled and resident in England, and an Englishman resident in a foreign country, but not having acquired a foreign domicile, must be governed by the rules of English law (*q*). And, when the government of a state contracts a loan in another country, the contract is

(*k*) *Chamberlain* v. *Napier*, 15 Ch. D. 614.

(*l*) *Robinson* v. *Bland*, 1 W. Bl. 256, 259; *Gibbs* v. *Fremont*, 9 Exch. 25.

(*m*) *Scott* v. *Pilkington*, 2 B. & S. 11; 31 L. J. Q. B. 81.

(*n*) *Robinson* v. *Bland*, 2 Burr. 1085; 1 W. Bl. 234, 257; *Forbes* v. *Cochrane*, 2 B. & C. 471; *Guepratte* v. *Young*, 4 De G. & Sm. 217; *Cood* v. *Cood*, 33 L. J. Ch. 278; *Hope* v. *Hope*, 8 De G. M. & G. 731; 26 L. J. Ch. 417.

(*o*) *Huber* v. *Steiner*, 2 Sc. 304; *Leroux* v. *Brown*, 12 C. B. 803; 22 L. J. C. P. 1; *De La Vega* v. *Vianna*, 1 B. & Ad. 284; *Macfarlane* v. *Norris*, 2 B. & S. 783; 31 L. J. Q. B. 245; *Williams* v. *Wheeler*, 8 C. B. N. S. 299.

(*p*) *Peninsular & Oriental Steam Navigation Co.* v. *Shand*, 3 Moo. P. C. N. S. 272.

(*q*) *Cood* v. *Cood*, 33 Beav. 314.

governed by the law of the borrowing state, and not by that of the country where the contract is made (*r*). When a contract is made in a foreign country and in a foreign language, an English court, having to construe it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if any); thirdly, evidence of the foreign law applicable to it; and, fourthly, evidence of any peculiar rules of construction which may exist in that law; and must then itself interpret the document on ordinary principles of construction (*s*). Where mutual debts are contracted in a foreign country, the law of that country as to set-off will apply (*t*).

Foreign bonds, bills, and notes.—See now the Bills of Exchange Act, 1882, s. 72, in the Appendix, as to the conflict of laws regarding bills and notes. If a bond or obligation for the payment of a sum of money be made in France, and no place of payment is designated on the face of the contract, the extent of obligation and liability incurred on the one side, and the rights acquired on the other, will be regulated by the law of France (*u*); but, if the money is to be paid in England, the legal effect of the contract will be determined by the English law, the "*lex loci solutionis.*" On a foreign bill the liability of the acceptor, and the rate of interest payable, where no rate is expressed on the face of the bill, will be determined by the law of the country where the bill is payable; but the obligation of the drawer, who binds himself to pay in case the acceptor does not, will be governed by the law of the place where the bill was drawn, and not by the law of the place where it was to be paid by the drawee. In the case of a bill drawn in France and accepted in England, if the drawer is sued upon the bill, the contract will be governed by the law of France, where the bill was drawn; if the acceptor is sued, it will be governed by the law of England, where the acceptor's contract to pay was made (*x*). A bill drawn in France *primâ facie* bears interest as a debt in France would do, if nothing else appear: but, if that bill be endorsed in Belgium, the indorser is a new drawer; and it may be a question whether this indorsement is a drawing of a new bill in Belgium, or only a new drawing of the French bill. In the former case it would carry the Belgian, in the latter the French, rate of interest (*y*). The indorsement of a bill in blank does not according to the French law pass the

(*r*) *Smith* v. *Wequelin*, L. R. 8 Eq. 198; 38 L. J. Ch. 465.

(*s*) *Di Sora* v. *Phillips*, 10 H. L. Cas. 624.

(*t*) *Macfarlane* v. *Norris*, 2 B. & S. 783; 31 L. J. Q. B. 245; *sed quære.*

(*u*) *Melan* v. *Duke de Fitzjames*, 1 B. & P. 142.

(*x*) *Cammell* v. *Sewell*, 29 L. J. Ex. 350; 5 H. & N. 728.

(*y*) *Allen* v. *Kemble*, 6 Moore, P. C. 322; *Gibbs* v. *Fremont*, 9 Exch. 31; 22 L. J. Ex. 302.

property in the bill absolutely, but only subject to all the exceptions which would be available against the indorser himself; but such an indorsee is entitled to sue on the bill in his own name in France, and therefore can do the same in this country (z). If the bill is drawn and accepted and payable in England, an indorsement in blank in France by a French subject residing there will give to the holder a right to sue the acceptor in this country (a).

Foreign purchases — Affreightments.—The fulfilment of a contract for the sale of goods, so far as it relates to the transfer and delivery of the goods to the purchaser, according to quantity, weight, or measure, will be regulated by the law of the country where the delivery is to be made (b). If a contract is made in England to load a full cargo on board a vessel at a foreign port, the meaning of the words "full cargo" will be regulated by the law of the foreign port, and not by the law of England. If an order is sent from England for the purchase of goods in Russia, to be delivered on board an English ship in a Russian port, the rights and liabilities growing out of the contract will be governed by the law of Russia; and, if, after the delivery of the goods on board ship, the unpaid vendor has a right, by the law of Russia, to re-possess himself of the goods, on having reason to suspect that the purchaser contemplates bankruptcy, or intends to make the vendor lose the purchase-money, this right will be recognised in our courts of common law (c).

The validity of a bottomry-bond taken up in a foreign port upon a foreign ship, freight, and cargo, the owners of the cargo being English, and the ship and cargo being proceeded against in England, is to be governed by the general maritime law, and not by the *lex loci contractûs*, or the law of the country the vessel belongs to (d).

What determines the locus contractûs.—When contracts are entered into between parties residing in different countries through the medium of letters, the place where the final assent has been given by one party to an offer made by another is the place where the contract is considered to have been made. Thus, if a merchant at Genoa, by letter or by agent, offers to sell certain goods to a person in London at a certain price, and the latter accepts the offer, the contract is made in London. But, if the person in

(z) *Bradlaugh* v. *De Rin*, L. R. 5 C. P. 473; 39 L. J. C. P. 254; overruling *Trimbey* v. *Vignier*, 1 Bing. N. C. 151.

(a) *Lebel* v. *Tucker*, L. R. 3 Q. B. 77; 37 L. J. Q. B. 46.

(b) 3 Burge Colon. Law, p. 771; *Rosseter* v. *Cahlmann*, 8 Exch. 361; Byles, J., *Meyer* v. *Dresser*, 33 L. J. C. P. 289; *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; 35 L. J. Q. B. 74; *Maspous-y-Hermano* v. *Mildred*, 9 Q. B. D. 530.

(c) *Inglis* v. *Usherwood*, 1 East, 515.

(d) *Duranty* v. *Hart*, 2 Moo. P. C. N. S. 289.

London refuses the offer, and proposes to buy upon different terms, and the merchant of Genoa agrees to the proposal there, the contract will then be deemed to have been concluded at Genoa (e). "If I send my agent to Scotland, and he in my name makes a contract there, it is the same as if I were myself on the spot; and the contract must be considered as a contract entered into in Scotland" (f). In the case of contracts in writing, the place where the covenantor or promisor executes or signs the contract is the place where it is made, although the contract is inchoate and incomplete, and does not obtain legal validity until something else has been done with his authority at some different place (g).

When a contract entered into in one country is sought to be enforced in another country, it must not only be valid according to the law of the country where it was made, but also according to the law of the country in which it is sought to be enforced (h).

SECTION II.

OF THE ADMISSIBILITY OF ORAL EVIDENCE IN WRITTEN CONTRACTS.

Inadmissibility of oral evidence to add to, alter, or contradict a written contract.—Most systems of jurisprudence have manifested a decided preference for written memorials over verbal representations founded on the doubtful or imperfect recollection of witnesses. The French law requires a very large class of contracts to be put into writing, "in consequence," it observes, "of the corruption of manners and subornation of witnesses," and formally prohibits the admission of oral evidence against the contents of a written document (i). It is a fundamental rule of our own common law that oral evidence shall not be given to add to, subtract from, or alter or vary, any description of written contract: "*quoties in verbis nulla est ambiguitas, nulla expositio contra verba fienda est.*" This general rule or principle of law has been established on the ground that writing stands higher in the scale

(e) 2 Burge on Colon. Law, 753.
(f) *Albion Fire, &c.* v. *Mills*, 3 Wils. & Shaw, 233.
(g) *Snaith* v. *Mingay*, 1 M. & S. 92.
(h) *Hope* v. *Hope*, 8 D. M. & G. 731; 26 L. J. Ch. 417; *Grell* v. *Levy*, 16 C. B. N. S. 79; *Branley* v. *S. E. Ry. Co.*, 12 C. B. N. S. 72; 31 L. J. C. P. 286.
(i) POTH. OBL. No. 785.

of evidence than oral testimony, and that the stronger evidence ought not to be controlled or altered by the weaker (*k*). It has been held that oral evidence is inadmissible to show that a grant of an annuity, not made subject to redemption on the face of the deed, was nevertheless intended by the parties to be redeemable (*l*); also that the verbal declaration of an auctioneer, made at the time of sale, cannot be given in evidence in opposition to the printed conditions of sale, unless the declaration has been fraudulently made (*m*). If, in a contract of charter-party, a person states himself to be the owner of a vessel, and then proceeds to let or charter the vessel for a certain term, he cannot contradict by oral testimony his own averment in writing and show that he acted only as the agent of the owner (*n*). If a written contract of purchase and sale describes the nature and character of the things sold, oral evidence is inadmissible to add to or alter the written description (*o*); if it fixes the time for the completion of the purchase, or the time for the delivery of the goods, a contemporary agreement to substitute another day must be expressed in writing (*p*); and if the time for payment is named, oral evidence is inadmissible to show that the payment was to be prolonged, or that it was to depend on a contingency, or be made out of a particular fund. So, on a written contract for a weekly hiring, oral evidence is inadmissible to show that a yearly hiring was intended (*q*). And, on a contract to manufacture and deliver goods at a specified time for a specified price, oral evidence is inadmissible to show that a portion of the price agreed to be paid for the goods was in consideration of the undertaking to deliver them at the times specified, and that the market price was much less than that agreed to be paid (*r*). Oral evidence is inadmissible to make a promissory note, absolute upon the face of it, conditional or payable upon a contingency (*s*), or to make a contract which, by the terms of it, is to commence *in præsenti*, to commence *in futuro* (*t*); or to show that it was agreed, when a bill or note was given or indorsed, that the instrument should be renewed, and that payment should not be demanded at the time when it became due (*u*); but, where

(*k*) *Davis* v. *Symonds*, 1 Cox. 404.

(*l*) *Haynes* v. *Hare*, 1 H. Bl. 662.

(*m*) *Gunnis* v. *Erhart*, 1 H. Bl. 289; *Shelton* v. *Livius*, 2 Cr. & J. 411; *Higginson* v. *Clowes*, 15 Ves. 522; *Eden* v. *Blake*, 13 M. & W. 618.

(*n*) *Humble* v. *Hunter*, 17 L. J. Q. B. 350.

(*o*) *Smith* v. *Jeffryes*, 15 L. J. Ex. 325; *Harnor* v. *Groves*, 24 *ib.* C. P. 53.

(*p*) *Stead* v. *Dawber*, 10 Ad. & E. 57; 2 P. & D. 451; *Marshall* v. *Lynn*, 6 M. & W. 109; *Stowell* v. *Robinson*, 3 Bing. N. C. 928.

(*q*) *Evans* v. *Roe*, L. R. 7 C. P. 138.

(*r*) *Brady* v. *Oastler*, 3 H. & C. 112; 33 L. J. Ex. 300.

(*s*) *Rawson* v. *Walker*, 1 Stark. 361; *Moseley* v. *Hanford*, 10 B. & C. 729; *Foster* v. *Jolly*, 1 C. M. & R. 703; *Free* v. *Hawkins*, 1 Moore, 535; 8 Taunt. 92; *Adams* v. *Wordley*, 1 M. & W. 374; *Abrey* v. *Crux*, L. R. 5 C. P. 37; 39 L. J. C. P. 9.

(*t*) *Williams* v. *Jones*, 5 B. & C. 108.

(*u*) *Hoare* v. *Graham*, 3 Campb. 56; *Brown* v. *Langley*, 5 Sc. N. R. 249.

bought and sold notes differed, oral evidence was admitted to prove an arrangement between the broker and the purchaser, by which the apparent variance was explained and shown to be immaterial (*x*).

A warranty, made orally on the completion of a written contract of sale, cannot be introduced as part of the contract, if the contract itself is silent as to the fact of such warranty (*y*); but a loose and incomplete memorandum of sale will not exclude oral evidence of a warranty (*z*). If a written demise be silent as to the payment of the ground rent (*a*), or land tax (*b*), oral evidence is inadmissible to show that the tenant agreed to pay it. If a written contract of purchase and sale imports that the delivery of the goods and the payment of the price are to be concurrent acts, oral evidence is inadmissible to show that credit was bargained for and intended to have been given (*c*). But a writing containing only part of the contract, and not being evidence of a concluded agreement, does not shut out oral evidence of the time of payment. Where the defendant by letter ordered the plaintiff to send goods to a wharf, oral evidence was admitted to show that the order was given on the faith of a promise made by word of mouth by the plaintiff to the defendant, that the defendant should have six months' credit for the payment of the goods (*d*). When an agreement for a lease has been drawn up in writing, oral evidence cannot be given to show that more premises were intended to be included in the agreement than those actually mentioned in it, or that a greater rent was to be paid than that actually expressed, or that the rent was to be paid quarterly, when by the agreement it is to be paid yearly, or that the rent was to commence at a later day than that named in the agreement; for, whenever the contract is reduced into writing, nothing that is not found impressed upon it can be considered as forming part of the contract (*e*). But the contract may be evidenced and established, as we have previously seen, through the medium of several writings, as well as by one document; and the import of a written paper, purporting to contain the terms of a contract, may be controlled, altered, or extended, by a contemporaneous agreement in writing (*f*), provided it be shown that both papers refer to the same subject-matter, persons, and things. And, where there is a proposal only in

(*x*) *Kempson* v. *Boyle*, 3 H. & C. 763; 34 L. J. Ex. 191.

(*y*) *Powell* v. *Edmunds*, 12 East, 6; *Harnor* v. *Groves*, 15 C. B. 667.

(*z*) *Allen* v. *Pink*, 4 M. & W. 140.

(*a*) *Preston* v. *Merceau*, 2 W. Bl. 1249.

(*b*) *Rich* v. *Jackson*, 4 Br. C. C. 515.

(*c*) *Ford* v. *Yates*, 2 Sc. N. R. 645.

(*d*) *Lockett* v. *Nicklin*, 19 L. J. Ex. 403; 2 Ex. 93; *Stones* v. *Dowler*, 29 L. J. Ex. 122; *Angel* v. *Duke*, L. R. 10 Q. B. 174.

(*e*) *Meres* v. *Ansell*, 3 Wils. 275; *Henson* v. *Coope*, 3 Sc. N. R. 48; *Kain* v. *Old*, 4 D. & R. 61; *Dickson* v. *Zizinia*, 20 L. J. C. P. 73.

(*f*) *Brown* v. *Langley*, 5 Sc. N. R. 249.

writing, oral evidence may be given to show that that proposal has been accepted (*g*), but not of what passed at the time of making the proposal for the purpose of varying the contract (*h*).

Where there was a discrepancy between a lease and its counterpart, the counterpart was looked at to ascertain where the mistake lay (*i*).

But, although, by the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to, subtract from, or in any manner to vary or qualify the express terms of the written contract (*k*), yet an agreement upon a distinct matter may be shown to have been made by word of mouth, and may be enforced (*l*); and, after an agreement has been reduced into writing, it is competent to the parties, at any subsequent time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, subtract from, or vary or qualify, the terms of it, and thus to make a new contract, which may be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon it, provided the new contract thus sought to be established in the place and stead of the original written contract be not a contract of such a nature as is required to be authenticated by writing; for, when that is the case, the new substituted contract cannot be proved partly by writing and partly by oral testimony (*m*), and will not be good for any purpose; but the original contract will remain in force (*n*). Parol evidence is, however, admissible where it goes to show, not a new contract, but simply a voluntary forbearance by the plaintiff at the request of the defendant; for in such a case the Statute of Frauds does not apply (*o*); and it is immaterial whether the request for forbearance was made before or after the contract was broken (*p*).

When contracts may be proved partly by writing and partly by oral testimony.—Oral testimony in aid of insufficient written

(*g*) *Wake* v. *Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273.

(*h*) *Hotson* v. *Browne*, 9 C. B. N. S. 442; 30 L. J. C. P. 106.

(*i*) *Burchell* v. *Clark*, 2 C. P. D. 88.

(*k*) Lord Hardwicke, *Paterick* v. *Powlet*, 2 Atk. 383; *Wollam* v. *Hearn*, 7 Ves. 218.

(*l*) *Lindley* v. *Lacey*, 34 L. J. C. P. 7; 17 C. B. N. S. 578; *Morgan* v. *Griffith*, L. R. 6 Ex. 70; 40 L. J. Ex. 46; *Erskine* v. *Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 855.

(*m*) *Goss* v. *Lord Nugent*, 5 B. & Ad. 65; *Stead* v. *Dawber*, 10 Ad. & E. 65; *Cowley* v. *Vitty*, 21 L. J. Ex. 135; *Sanderson* v. *Graves*, L. R. 10 Ex. 234.

(*n*) *Noble* v. *Ward*, 36 L. J. Ex. 91; L. R. 2 Ex 135; *Plevens* v. *Downing*, 1 C. P. D. 220.

(*o*) *Ogle* v. *Lord Vane*, L. R. 2 Q. B. 275; *ib.* 3 Q. B. 272; 7 B. & S. 855; 36 L. J. Q. B. 175; 37 L. J. Q. B. 77.

(*p*) *Hickman* v. *Haynes*, L. R. 10 C. P. 598.

evidence of a contract is admissible, when the contract is not required by law to be in writing. If a written document, for example, amounts to a mere admission or acknowledgment of certain facts, forming a link only in the chain of evidence by which a contract is sought to be established, it may be given in evidence concurrently with, and may be aided and supported by, oral testimony (*q*). Thus, in the case of a contract for work and services, if the names of the contracting parties are not mentioned, or the price to be paid for the work is not specified, or the quantity not named, and the writing consequently does not amount to a contract, oral proof of the additional facts and circumstances necessary to constitute a contract and give effect to the transaction is admissible. Such evidence does not alter or add to an existing contract, as no contract exists independently of it (*r*). An invoice made out after a sale of goods has been effected is not conclusive evidence that the parties named in it as the contracting parties are really the contracting parties; but oral evidence is admissible to show that a party named therein as a vendor was not in reality the vendor (*s*). Where the plaintiff signed a consignment note, which stated that certain goods were delivered by him to a railway company to be carried to N., but the charge for carriage was not mentioned, and oral evidence was given that the company's agreement with the plaintiff before the note was signed was to carry to K., but that the plaintiff did not read the note, and that the sum to be charged, and which was paid, was for the carriage to K., it was held that the evidence was admissible on the ground that the note was not a complete contract (*t*). A document purporting to be a contract, signed by the parties, is not necessarily so; and it is competent for either of the parties to show by parol evidence that it was not their intention in signing it that it should operate as a contract, and that the real contract between them was not in writing (*u*). And generally oral evidence is admissible for the purpose of showing that the real contract between the parties is not in writing, and that a subsequent written contract does not contain, and was not intended to contain, the whole agreement between them (*x*). But, where a written proposal, signed by the defendant, was adopted in terms by the plaintiff, though not in writing, it was held that evidence of what passed at the time of making the proposal was not

(*q*) *Eden* v. *Blake*, 13 M. & W. 618; *Bolckow* v. *Seymour*, 17 C. B. N. S. 107; *Stones* v. *Dowler*, 29 L. J. Ex. 122.

(*r*) *Knapp* v. *Harden*, 1 Gale, 47; *Ingram* v. *Lee*, 2 Campb. 521.

(*s*) *Holding* v. *Elliott*, 5 H. & N. 117; 29 L. J. Ex. 134.

(*t*) *Malpas* v. *London and South-Western Ry. Co.*, L. R. 1 C. P. 336; 35 L. J. C. P. 166, explaining *Jeffery* v. *Walton*, 1 Stark. 267.

(*u*) *Rogers* v. *Hadley*, 2 H. & C. 227; 32 L. J. Ex. 241.

(*x*) *Harris* v. *Rickett*, 4 H. & N. 1; 28 L. J. Ex. 197.

admissible for the purpose of varying the construction of the writing (*y*). Oral evidence is always admissible for the purpose of identifying the subject-matter of the contract, as, for instance, to show that a contract referring to a bill as of the 24th of October was intended to apply to one dated the 25th (*z*), or to explain what was meant by the words "your wool" in a contract for the purchase of wool so described (*a*), or the words "your employ" in a contract of service (*b*), or the words "the lease" in an agreement to procure a lease (*c*). In equity a defendant may prove a parol variation or addition to a written contract where he is resisting specific performance of the contract; and a plaintiff may also make use of a parol variation, when there has been such a part performance of the parol portion of the agreement, as would enable the court to decree a specific performance in the case of an original and independent agreement, or where the omission has occurred by fraud, or, in cases not within the Statute of Frauds, by clear mistake (*d*).

Annexation of agricultural and mercantile customs.—Customary rights and incidents universally attaching to the subject-matter of the contract in the place and neighbourhood where the contract was made are impliedly annexed to the written language and terms of the contract, unless the custom is particularly and expressly excluded (*e*). Parol evidence of custom and usage, consequently, is always admissible to enable us to arrive at the real meaning of the parties (*f*), but not to prevail over and nullify the express provisions and stipulations of the contract (*g*). The evidence of usage must, however, be clear and distinct, in order to affect the meaning of the terms of the contract (*h*), and not be inconsistent therewith (*i*). The known and received usage of a particular trade or profession, and the established course of every mercantile or professional dealing, are considered to be tacitly annexed to the terms of every mercantile or professional contract made in the ordinary course of business in which the

(*y*) *Hotson* v. *Browne*, *ante*, p. 201.

(*z*) *Way* v. *Hearn*, 13 C. B. N. S. 292; 32 L. J. C. P. 34.

(*a*) *Macdonald* v. *Longbottom*, 1 Ell. & Ell. 977; 28 L. J. Q. B. 293; 29 *ib.* 256.

(*b*) *Mumford* v. *Gething*, 7 C. B. N. S. 305; 29 L. J. C. P. 105.

(*c*) *Horsey* v. *Graham*, L. R. 5 C. P.; 39 L. J. C. P. 58.

(*d*) *Woolam* v. *Hearn*, 2 W. & T. Lead. Cas. in Eq., 2nd ed., p. 404; *Laver* v. *Fielder*, 32 Beav. 1.

(*e*) Many agricultural customs have been embodied in the Agricultural Holdings Act, 38 & 39 Vict. c. 92; and for divers customs of different counties see Woodfall's Landlord and Tenant, 11 ed., by Lely, 721.

(*f*) *Hutton* v. *Warren*, 1 M. & W. 475, 476; Domat. liv. 1, tit. 1; *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L. C. 5th ed., p. 520.

(*g*) *Clarke* v. *Roystone*, 13 M. & W. 752; 14 L. J. Ex. 143; 2 Taylor on Evidence, p. 1026, 5th ed.; *Blackett* v. *Royal Exchange Assurance Co.*, 2 C. & J. 429; *Roxburghe* v. *Robertson*, 2 Bligh, 156; *Roberts* v. *Barker*, 1 C. & M. 808; *Phillips* v. *Briard*, 1 H. & N. 21; *Cuthbert* v. *Cumming*, 24 L. J. Ex. 200.

(*h*) *Bowes* v. *Shand*, 2 Ap. Cas. 455.

(*i*) *Hayton* v. *Irwin*, 5 C. P. D. 130, C. A.

usage prevails (*k*), if there be no words therein expressly controlling or excluding the ordinary operation of the usage; and parol evidence thereof may consequently be brought in aid of the written instrument (*l*). The principle on which the evidence is admitted is, that the parties have set down in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must be considered to contract, unless they expressly exclude them (*m*). Whether the terms of the contract are such as to exclude evidence of the custom is a question for the judge and not for the jury (*n*). A local custom or usage of a particular place, or of a particular class of persons, is not binding upon persons living at a distance, and who are proved to have been wholly unacquainted with such usage (*o*). And a custom in a particular market that a broker to buy is a principal to sell, is not binding upon a person ignorant of the existence of such custom, for it changes the intrinsic character of the contract (*p*). And so is a rule that a broker can only recognize the person employing him, although he knows him to be only an agent (*q*). If the terms of the contract are clear, they must prevail in the absence of very clear and consistent evidence that, by custom, something different is meant (*r*). But, if a merchant residing in London employs an agent in Liverpool to make a contract there, the contract so made will be clothed with all the incidents of a Liverpool contract in respect of custom and usage of trade (*s*). Where the written contract does not exclude the custom, oral evidence is not admissible for the purpose of showing that the parties did not intend it to apply (*t*). Oral evidence is admissible to show that by the custom of a particular trade persons describing themselves in the contract as "agents to merchants" are personally liable, if they do not disclose their principals within a reasonable time (*u*).

(*k*) *Allan* v. *Sundius*, 1 H. & C. 123; 31 L. J. Ex. 307.

(*l*) *Syers* v. *Jonas*, 2 Exch. 111; *Grant* v. *Maddox*, 15 M. & W. 737; *Bourne* v. *Gatcliffe*, 3 Sc. N. R. 40.

(*m*) *Humfrey* v. *Dale*, 26 L. J. Q. B. 140; 7 Ell. & Bl. 266; El. Bl. & El. 1004; 27 L. J. Q. B. 390; *Lucas* v. *Bristow*, 27 *ib.* Q. B. 364; Ell. Bl. & Ell. 907; *Reg.* v. *Stoke-upon-Trent*, 13 L. J. M. C. 41; *Brown* v. *Byrne*, 3 Ell. & Bl. 715; *Cuthbert* v. *Cumming*, 10 Exch. 815; *Field* v. *Lelean*, 6 H. & N. 617; 30 L. J. Ex. 168; *Myers* v. *Sarl*, 30 L. J. Q. B. 9; 3 Ell. & Ell. 306; *Fleet* v. *Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49.

(*n*) *Parker* v. *Ibbetson*, 4 C. B. N. S. 355; 27 L. J. C. P. 236.

(*o*) Lord Tenterden, C. J., *Bartlett* v. *Pentland*, 10 B. & C. 770; *Kirchner* v. *Venus*, 12 Moore P. C. 399; *Sweeting* v. *Pearce*, 30 L. J. C. P. 109; 9 C. B. N. S. 534.

(*p*) *Robinson* v. *Mollett*, L. R. 7 H. L. 802.

(*q*) *Pearson* v. *Scott*, 9 Ch. D. 198.

(*r*) *Bowes* v. *Shand*, 3 Ap. Cas. 455; *Hayton* v. *Irwin*, 5 C. P. D. 130.

(*s*) *Graves* v. *Legg*, 2 H. & N. 213; 26 L. J. Ex. 316.

(*t*) *Fawkes* v. *Lamb*, 31 L. J. Q. B. 98; but see *Burges* v. *Wickham*, 33 L. J. Q. B. 17.

(*u*) *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482.

Customary meaning of particular words.—If, by the known usage of trade or by custom, a word has acquired, in respect of the subject-matter of the contract, a peculiar sense and meaning different from the ordinary popular sense and meaning, evidence is admissible to show that the parties used the word in its customary trade acceptation, and not in the ordinary popular sense. Thus, the word *thousand* in certain trades comprehends a larger number of units than it does in its ordinary acceptation. In the herring trade, for example, *six* score herrings went to the hundred, and sixty to the thousand; and parol evidence was held to be consequently admissible to show that the word "thousand," when applied to herrings, in the contracts of herring-dealers, meant twelve hundred. In a lease of a rabbit warren, parol evidence was admitted to show that by the custom of the country where the lease was made, in taking an account of the rabbits on a rabbit warren, the numbers were computed at one hundred dozen to a thousand; and the word "thousand" in a lease as applied to rabbits was consequently construed to mean one hundred dozen, or twelve hundred (*x*). So, where an insurance was effected "to any port in the Baltic," evidence was admitted to show that the Gulf of Finland is considered by universal custom and consent amongst merchants and in mercantile contracts to be within the Baltic, though the two seas are treated as distinct by geographers (*y*). And in a lease of a coal mine evidence was admitted to show that the word "*level*" in mining districts had a meaning different from the ordinary popular meaning, and that the word was used by the parties to the contract in the sense in which it is ordinarily employed by miners (*z*). But the custom and usage must be general and universal, and not the practice or course of dealing of a particular firm or house of trade, such as the usage of Lloyd's (*a*).

Terms of art—Trade acceptations.—The meaning of all words and terms of art and specifications of quantity, quality, weight, and measure, are regulated and controlled by local custom, unless the terms have been selected, and a definite meaning given to them, by the legislature (*b*). But, to vary the meaning of plain words, the existence of the custom must be "clear, cogent, and irresistible" (*c*). If there are peculiar expressions used in a contract, which have in a particular place or trade a known meaning

(*x*) *Smith* v. *Wilson*, 3 B. & Ad. 728.

(*y*) *Uhde* v. *Walters*, 3 Campb. 16; *Brough* v. *Whitmore*, 4 T. R. 210; *Anderson* v. *Pitcher*, 2 B. & P. 168.

(*z*) *Clayton* v. *Gregson*, 5 Ad. & E. 302.

(*a*) *Gabay* v. *Lloyd*, 3 B. & C. 797; *Sweeting* v. *Pearce*, *ante*, p. 204; *Scott* v. *Irving*, *post* p. 691.

(*b*) *Taylor* v. *Briggs*, 2 C. & P. 525; *Hutchison* v. *Bowker*, 5 M. & W. 535; *Spicer* v. *Cooper*, 1 Q. B. 424.

(*c*) *Lewis* v. *Marshall*, 13 L. J. C. P. 193.

attached to them, it is for the jury to say what the meaning of those expressions is, but for the court to decide what is the meaning of the contract (*d*).

Oral evidence of conditional assent.—If two parties sign a memorandum of a contract upon the strength of a clear oral agreement that the writing is not to be binding until the happening of a given event, and the event never happens, there is no contract (*e*). Where a party claims as the indorsee of a bill of exchange, it may be shown that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee for a particular purpose, and on the understanding that it should not operate as an indorsement until the condition was fulfilled (*f*). And, if an oral agreement and an agreement in writing have been made, whether contemporaneously or not, upon two distinct independent matters, and the one does not conflict with or alter the other, both may stand; and the oral bargain may be enforced as well as the contract in writing (*g*). When the contract is evidenced by letters and writings, it is for the court to interpret them and determine whether they do or do not amount to a concluded contract; and, if the judge leaves it to a jury to say what is the effect and meaning of written correspondence, there is a misdirection (*h*).

Estoppel by deed.—The rule of law which stops a party from disputing or contradicting what he has affirmed or declared by deed (*ante*, p. 19) does not, of course, extend to strangers to the contract (*i*). A party to a deed, moreover, is not estopped in an action by another party not founded on the deed, and wholly collateral to it, from disputing the truth of certain facts recited and set forth in such deed (*k*). When a recital in a deed is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, where it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the whole instrument (*l*). As between the parties themselves, any averment of a fact made by one of the parties

(*d*) *Hutchison* v. *Bowker*, 5 M. & W. 542; *Neilson* v. *Harford*, 8 *ib.* 823; *Trueman* v. *Loder*, 11 Ad. & E. 599; *Sotilichos* v. *Kemp*, 18 L. J. Ex. 36; 3 Ex. 105.

(*e*) *Pym* v. *Campbell*, 6 Ell. & Bl. 370; 25 L. J. Q. B. 277; *Rogers* v. *Hadley*, *ante*, p. 202; *Lindley* v. *Lacey*, 34 L. J. C. P. 9; 17 C. B. N. S. 578; *Wallis* v. *Littell*, 11 C. B. N. S. 369; 31 L. J. C. P. 100; *Davis* v. *Jones*, 17 C. B. 634.

(*f*) *Bell* v. *Lord Ingestre*, 12 Q. B. 317; *Bannerman* v. *White*, 31 L. J. C. P. 28.

(*g*) *Lindley* v. *Lacey*, *ante*, p. 201; *White* v. *Parkin*, 12 East, 578; *Harris* v. *Rickett*, *ante*, p. 202; *Green* v. *Saddington*, 7 Ell. & Bl. 503.

(*h*) *Cheveley* v. *Fuller*, 13 C. B. 122.

(*i*) *Rex* v. *Scammonden*, 3 T. 474.

(*k*) *Carpenter* v. *Buller*, 8 M. & W. 209.

(*l*) *Stroughill* v. *Buck*, 14 Q. B. 787; 19 L. J. Q. B. 209; *Wiles* v. *Woodward*, 5 Ex. 557; 20 L. J. Ex. 264.

in the nature of a representation or warranty to the other may be contradicted and shown to be false by that other (*m*). But the party who makes the averment is not permitted to contradict or dispute the fact recited (*n*). If a lease, however, recites that the lessor is possessed of real or personal property, the lessee who executes and accepts such lease is estopped, during the continuance of his occupation, from denying the title and possession of his lessor at the time such lease was executed (*o*).

A "grant" of an estate which would amount in equity to a representation, does not amount in law to a representation of a right to grant, that is, to an estoppel. There must be a strict recital to the effect that the party has the right or title in order by estoppel to bind him or persons claiming through him (*p*).

Estoppels in pais arise "where a party by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, and alter his own previous position." A party who has so acted is said to be estopped before the country, and precluded from falsifying his own representation (*q*). Conduct by negligence or omission to do an act is equally within the rule, but in order to create an estoppel it must be shown that the party setting it up has been induced by such negligence or omission to alter his position (*r*). If one party dealing with another puts forth a sealed instrument as his deed, or if he represents it to be a binding obligation which he has himself executed, he cannot be heard in any court of law or equity to say, as against a party who has dealt with him on the faith of the correctness of the representation, that the instrument is not his deed, or that he never executed it, or that it is not a binding obligation (*s*). If on the evidence it appears that two persons upon the negotiation of a mercantile security have assumed by common consent a certain fact, such as that a particular person is the drawer of a bill, or if by express agreement between them a bill is drawn and indorsed by procuration in the name of a fictitious or dead person, and the position of one of the parties has been altered on the faith of the arrangement, the other cannot afterwards be permitted to say that the bill was not drawn or indorsed as it purports to be (*t*).

(*m*) *Hayne* v. *Maltby*, 3 T. R. 441; Vin. Abr. Estoppel, M. 455.

(*n*) *Oldham* v. *Langmead*, cited 3 T. R. 439; *Humble* v. *Hunter*, 17 L. J. Q. B. 350; 12 Q. B. 310.

(*o*) *Beckett* v. *Bradley*, 8 Sc. N. R. 843; 7 M. & Gr. 995.

(*p*) *General Finance Co.* v. *Liberator Soc.*, 10 Ch. D. 15.

(*q*) *Pickard* v. *Sears*, 6 Ad. & E. 474; *M'Cance* v. *Lond. & N. W. Ry. Co.*, 34 L. J. Ex. 39; 3 H. & C. 343; *Freeman* v. *Cooke*, 2 Exch. 654; *Carr* v. *London & N. W. Ry.*, L. R. 10 C. P. 316; *Citizen's Bank of Louisiana* v. *First National Bank of New Orleans*, L. R. 6 H. L. 352; *Williams* v. *Stern*, 5 Q. B. D. 409.

(*r*) *Freeman* v. *Cooke*, *supra*; *Mc Kenzie* v. *British Linen Co.*, 6 Ap. Cas. 82.

(*s*) *Straffon, ex parte*, 22 L. J. Ch. 202.

(*t*) *Ashpital* v. *Bryan*, 32 L. J. Q. B. 95; 3 B. & S. 474.

But where the defendant left his blank acceptance in his table drawer, and the bill was stolen, and his name filled in as drawer of the bill, it was held he was not estopped (*u*).

Contradictable averments in written contracts not under seal.—Although the express admissions of a party inserted in a contract are strong evidence against him, yet he is at liberty, in certain cases, when the contract is not under seal, to prove that such admissions were mistaken or untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition, when the party is estopped, as we have seen, from disputing their truth with respect to that person and that transaction (*x*); and this rule or principle of law is applicable to mistakes in respect of legal liability, as well as in respect of matter-of-fact (*y*). But a person is not estopped by a mere undertaking or contract to do something which does not involve a representation of some fact or state of things (*z*). If a bill of exchange or promissory note purports on the face of it to be made for value received, it is competent to the parties to show that no value was received (*a*); and, if a receipt or acknowledgment of the payment of money has been given, oral evidence is admissible to contradict such receipt or acknowledgment, and rebut its legal operation as a discharge from liability (*b*). So, where a passenger who was injured by a railway accident, accepted 400*l.*, and gave the company a receipt expressed to be in full discharge of his claims, it was held that the statement in the receipt could be rebutted by evidence that he did not receive the money in full satisfaction of all demands (*c*).

(*u*) *Baxendale* v. *Bennett*, 3 Q. B. D. 525. See per Lindley, L. J., *In re Cooper*, 20 Ch. D. 611.

(*x*) *Heane* v. *Rogers*, 9 B. & C. 586.

(*y*) *Newton* v. *Liddiard*, 18 L. J. Q. B. 56.

(*z*) *Farmeloe* v. *Bain*, 1 C. P. D. 445.

(*a*) *Foster* v. *Jolly*, 1 C. M. & R. 708; *Ridout* v. *Bristow*, 1 C. & J. 231.

(*b*) *Lampon* v. *Corke*, 5 B. & Ald. 611; *Skaife* v. *Jackson*, 3 B. & C. 423; *Farrar* v. *Hutchinson*, 9 Ad. & E. 643; *Wallace* v. *Kelsall*, 7 M. & W. 273, 274; *Graves* v. *Key*, 3 B. & Ad. 313; *Bowes* v. *Foster*, 2 H. & N. 779.

(*c*) *Lee* v. *Lancashire & Yorkshire Railway Co.*, L. R. 6 Ch. 527.

BOOK II.

THE LAW OF PARTICULAR CONTRACTS.

CHAPTER I.

THE CONTRACT OF LETTING

SECTION I.

LANDLORD AND TENANT.

Leases.—A lease is a contract whereby the temporary use and possession of a house or land are granted by the owner to another for a stipulated or implied remuneration. He who grants the possession and use of the property to be enjoyed for hire is called the lessor or landlord; and he who has the enjoyment of it, paying the rent or hire, is called the lessee or tenant. In the Roman law the former was called "*locator,*" the latter "*conductor;*" and the contract itself, "*locatio rei.*" In the French law it is termed "*bail a loyer,*" or a bailment for hire; the lessor is called the "*bailleur,*" or bailor, and the hirer the "*preneur,*" or "*locataire*" (*a*). If the land or realty is granted by deed to be enjoyed for a term, without any payment of rent by the grantee, the grant amounts to a COMMODATUM or gratuitous loan of the use of the land, and does not create a contract of letting and hiring between the parties. On the other hand a demise for a term of years, if it is by deed, and for the whole term which the lessor has in the premises, operates as an assignment (*b*).

Agreements for leases.—We have already seen that all agreements for leases must be authenticated by some note or memorandum, signed according to the provisions of the Statute of Frauds (*ante*, p. 159). We have also seen that all leases exceeding three years in duration, required by the Statute of Frauds to be evidenced

(*a*) Encyc. du Droit, tit. BAIL.

(*b*) *Parmenter* v. *Webber*, 8 Taunt. 593; *Beardman* v. *Wilson*, L. R. 4 C. P. 57; 38 L. J. C. P. 91.

by a signed writing, must now be authenticated by deed (*ante*, p. 179). Every lease, therefore, in writing, not under seal, for a term exceeding three years in duration, amounts only to an agreement to grant a lease for the term specified (*c*). But, if an oral agreement for a lease has been entered into, and the intended lessee, relying on the promise of the lessor to grant the lease, takes possession of the land, and expends money in building, draining, and improving, and there is, therefore, a part performance of the contract, the court will enforce the oral contract, and compel the lessor to grant the lease agreed upon, on the ground that, by refusing to grant the lease and give the party possession in execution of the contract, he is guilty of a direct fraud, which ought to be relieved against (*d*). Part performance by a sub-lessee is equivalent to part performance by the lessee (*e*). When a party has actually been let into possession under an oral contract of demise, and rent has been paid to and received by the landlord, a tenancy from year to year between the parties arises by implication of law (*post*, p. 217). From every contract to grant a lease there is an implied agreement by the party contracting to grant the lease that he has a good right and title so to do (*f*). There may be an independent and collateral agreement to hold land at a rent, which, although it does not operate as a demise without taking possession, yet is a binding undertaking to pay the amount of the rent (*g*).

Present demises.—No precise words or technical form of language are requisite to constitute a present demise. An estate or term of years in the land may be created and vested in a third party, by giving him a licence to enjoy a house, or making an agreement with him that he "shall reside" therein, provided some certain rent or specified service is reserved, or something is given as the consideration of the contract, and possession is given and accepted under the contract (*h*). If there are any words showing a present intention that one is to give and the other to have possession for a determinate term, a tenancy is created; and this intention may be manifested by expressions contained in a series of letters, as well as by the formal words of a single instrument (*i*). And, on the other hand, although

(*c*) *Bond* v. *Rosling*, *Parker* v. *Taswell*, *Tidey* v. *Mollett*, *ante*, p. 179; *Burton* v. *Reevell*, 16 M. & W. 307; 16 L. J. Ex. 85; *Rollason* v. *Leon*, 7 H. & N. 73; 31 L. J. Ex. 96.

(*d*) *Morphett* v. *Jones*, 1 Swanst. 172; *Gregory* v. *Mighell*, 18 Ves. 328; *Mundy* v. *Joliffe*, 5 Myl. & Cr. 167; *Parker* v. *Smith*, 1 Coll. Ch. C. 608.

(*e*) *Williams* v. *Evans*, L. R. 19 Eq. 547.

(*f*) *Stranks* v. *St. John*, L. R. 2 C. P. 376; 36 L. J. C. P. 118.

(*g*) *Adams* v. *Haggar*, 4 Q. B. D. 480, C. A.

(*h*) Co. Litt. 45, b.; Bac. Ab. Leases (K).; *Right* v. *Proctor*, 4 Burr. 2209.

(*i*) *Chapman* v. *Bluck*, 5 Sc. 531; 4 Bing. N. C. 187; *Jones* v. *Reynolds*, 1 Q. B. 506.

there be precise and formal words of present demise, yet, if there appears from the face of the entire contract a contrary intention, the instrument will be considered only an agreement for a future lease, and will not operate as a present demise (*k*).

It is a rule of law that, whatever words are sufficient to explain the intent of the parties that the one shall divest himself of the possession and profits of the land, and the other come into them for such a determinate time, for a certain hire or rent, such words, whether they run in the form of an assignment, or of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose (*l*). A lease may be made either for life, or for years, or at will; and a contract for letting and hiring of land will, if it cannot operate as an assignment, be supported as a lease, although it was intended to pass all the lessor's interest (*m*). Whenever the house or land of one man has been occupied and used by another, the *primâ facie* presumption is that the use and occupation are to be paid for; and the landlord is entitled to maintain an action to recover a reasonable hire and reward for the use of the land, unless the tenant can show that he entered into possession of the property under circumstances fairly leading to an opposite conclusion. A landlord, on the other hand, who has permitted a tenant to occupy property, and has received rent from the latter for such use and occupation, will be bound by his own acts, and cannot afterwards treat such tenant as a trespasser and turn him out of possession without a proper notice to quit. But, if the tenant is a pauper who has been provided with a dwelling-house by the parish, or an old servant who has been accommodated with a cottage and garden by his master, or the son or other near relation of the owner, the possession and occupation do not raise a presumption of a contract of letting and hiring between the parties. The transaction amounts only to a *commodatum*, or gratuitous loan of the property for use. The possession of the tenant is the possession of the landlord or owner; and the former may at any time be removed at the will and pleasure of the latter (*n*).

Proof of the terms of holding.—If a tenancy is actually created by entry on the land and payment of rent, the terms of the tenancy may be proved by oral testimony. Where land was

(*k*) *Morgan* v. *Bissell*, 3 Taunt. 72; *Doe* v. *Powell*, 8 Sc. N. R. 687; *Gore* v. *Lloyd*, 12 M. & W. 478; *Doe* v. *Clark*, 7 Q. B. 211; *Taylor* v. *Caldwell*, 3 B. & S. 826.

(*l*) Bac. Abr. Leases (K.); Shep. Touch. ch. 14, 272; Bro. Abr. (Lease), pl. 60; *Cottee* v. *Richardson*, 7 Exch. 143.

(*m*) *Pollock* v. *Stacy*, 9 Q. B. 1035; 16 L. J. Q. B. 132.

(*n*) *Bertie* v. *Beaumont*, 16 East, 33; *Hunt* v. *Colson*, 3 M. & Sc. 791; *Doe* v. *Stanton*, 2 B. & Ald. 37[illegible].

about to be let, and printed papers of the terms of holding were distributed among parties, who assented verbally to the printed terms, and subsequently became tenants, it was held that a witness might look at the printed paper to refresh his memory when he was asked to prove the terms of the holding from recollection (*o*).

Lease by estoppel.—We have already seen, *ante*, p. 206, that no man is permitted to allege or prove anything in contradiction or contravention of his own deed. Where, therefore, a man grants a lease under seal, he is not permitted to avoid his own grant by proving that he had no interest in the demised premises, unless he is a trustee for the public, deriving his authority from an Act of Parliament (*p*). As between him and his lessee the lease operates by way of estoppel. "And, if one makes a lease for years, by indenture, of lands wherein he hath nothing at the time of such lease made, and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made; because he having by indenture expressly demised those lands, is, by his own act, estopped and concluded to say he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to take off or impeach the validity of the indenture, which expressly affirms that he did demise them; and consequently the lessee may take advantage thereof, whenever the lessor comes to such an estate in those lands as is capable to sustain and support that lease" (*q*). And, when the estoppel becomes good in point of interest, the heir of the lessor, and all persons claiming under the lessor by assignment or otherwise, are bound by the estoppel (*r*). Upon the execution of the lease there is created, in contemplation of law, a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee. So long, therefore, as a lessee enjoys everything which his lease purports to grant, he has no concern with the title of the lessor or the heir or assignee of the lessor (*s*). If, however, it appears, by the recitals of the lease, that the lessor had no interest in the land, or that he had only an equitable interest, at the time of the demise, there will be no estoppel (*t*). The lessee is also in like manner estopped from denying the lessor's title to grant the

(*o*) *Lord Bolton* v. *Tomlin*, 5 Ad. & E. 856.

(*p*) *Fairtitle* v. *Gilbert*, 2 T. R. 169.

(*q*) Bac. Abr. Lease (O).

(*r*) *Trevivan* v. *Lawrence*, 1 Salk. 276; 2 Smith's L. C., 5th ed., 640; *Goodtitle* v. *Morse*, 3 T. R. 371; 2 Wms. Saund. 418, a.; *Doe* v. *Thompson*, 9 Q. B. 1043.

(*s*) *Cuthbertson* v. *Irving*, 4 H. & N. 758; 6 H. & N. 135; 28 L. J. Ex. 306; 29 *ib.* 485.

(*t*) *Pargeter* v. *Harris*, 7 Q. B. 708; 15 L. J. Q. B. 117; *Greenaway* v. *Hart*, 14 C. B. 340; but see *Morton* v. *Woods*, L. R. 3 Q. B. 658; 4 Q. B. 293; 37 L. J. Q. B. 242; 38 *ib.* 81; *Ex parte Punnett*, 16 Ch. D. 226.

lease, and setting up such want of title as an answer to an action for the rent by the lessor or his assignee (*u*); for the law will not suffer the tenant to abuse a possession gained by the act and confidence of the landlord, and turn it to the injury of the latter (*x*). But he may show that the lessor's title has expired (*y*); and, if he is evicted and deprived of the use and enjoyment of the demised premises by some person claiming by title paramount, the eviction is pleadable in bar to a demand of the rent; but it must be an actual, and not a mere constructive, eviction (*z*). An attornment to a receiver appointed by the court constitutes a tenancy by estoppel between the tenant and the receiver which the court applies for the purpose of collecting the rents till a decree can be pronounced, taking care that the tenant shall be protected both while the receiver continues to act and when he is withdrawn (*a*).

Demises by agents.—If the steward of a person not named says to an occupier, "I let you into possession in the name of the landlord," he may afterwards show by parol evidence who that landlord is; and it is not open to the tenant to dispute the title of the unnamed landlord (*b*). Where an agreement was entered into by an agent in his own name for the letting of a house, and the rent was made payable to the agent in his own name, but at the commencement of the agreement he described himself as agent for the proprietors, it was held that he might show who were the proprietors at the time the agreement was signed, and that the tenant was estopped from disputing their title (*c*). A land-agent, or collector of rents, has, as such, no implied authority to grant leases (*d*).

Ascertainment and identification of the subject-matter of the demise.—It may always be shown by parol evidence what was, and what was not, parcel of the demise, and intended to pass to the lessee by the deed (*e*). If a general and comprehensive term and description be used in a lease, all the things usually comprehended under such general term and description will pass to the lessee, unless the surrounding circumstances and the relative situation and interests of the contracting parties plainly show that such could not have been their intention. By parol evidence of

(*u*) *Cuthbertson* v. *Irving*, 6 H. & N. 135; 29 L. J. Ex. 485.

(*x*) *Dolby* v. *Iles*, 11 Ad. & E. 335; *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50; *Levy* v. *Lewis*, 28 L. J. C. P. 144; 30 L. J. C. P. 142.

(*y*) *Claridge* v. *Mackenzie*, 4 Sc. N. R. 811; *Doe* v. *Skirrow*, 7 Ad. & E. 157; *Downs* v. *Cooper*, 2 Q. B. 263.

(*z*) *Delaney* v. *Fox*, 2 C. B. N. S. 768.

(*a*) *Evans* v. *Mathias*, 7 Ell. & Bl. 602.

(*b*) Tindal, C. J., *Fleming* v. *Gooding*, 10 Bing. 550.

(*c*) Per Mellor, J., *Prescott* v. *Ingram*, June 23rd, 1864; *Fleming* v. *Gooding*, 4 M. & Sc. 455.

(*d*) *Collen* v. *Gardner*, 21 Beav. 540.

(*e*) *Shipwith* v. *Green*, 8 Mod. 311.

extrinsic circumstances, a general and comprehensive term may be controlled and restricted so as to pass much less than is ordinarily comprised under the common legal acceptance of the term, and, on the other hand, a particular and limited term and description may be extended and enlarged, so as to comprehend and include much more than it generally comprises, in order to effectuate the plain and obvious meaning of the parties.

A lessor demised a messuage and piece of ground with the appurtenances to the defendant; and the latter, after he had taken possession, laid claim to a cellar under the messuage, on the ground that it had passed to him under the general description contained in his lease; and it was held that the lessor might show, through the medium of parol evidence, that, at the time of the demise, and previous thereto, the cellar had been severed from the messuage, and used as a wine cellar by a wine merchant under a separate and distinct lease, at a separate rent, which was known to the defendant at the time of his acceptance of the lease, and, therefore, that it could not have been the intention of the parties that the cellar so occupied by a third party should pass to him under the general description of the messuage and ground thereunto adjoining (*f*). Under the word "cottage" or "house," on the other hand, land may pass, if it can be shown that the land has for a length of time been used and occupied with the cottage or house at one entire rent, and has been commonly reputed to be part and parcel thereof. "Being found to be all one, it passeth well by the lease." Divers things that, by continual enjoyment with the principal thing demised, have by common reputation been deemed to belong to it, may well pass as part and parcel of the principal thing demised, if extrinsic circumstances show that such must have been the intention of the parties (*g*). "Wherever there is a sufficient description to ascertain the thing demised, a part of the description which is inaccurate may be rejected" (*h*).

Things appurtenant.—When a man grants a thing to be used for hire, he grants it with all such appurtenances and accompaniments as properly belong to it, and with all such rights of way as are necessary to enable the hirer to have that use and enjoyment of the thing demised for which the hire is agreed to be paid (*i*). But a grant of realty, to be used and enjoyed by the grantee for a term for rent or hire, transfers to the latter

(*f*) *Doe* v. *Burt*, 1 T. R. 703; *Bryan* v. *Wethered*, 3 Cro. 18; *Kerslake* v. *White*, 2 Stark. 508; *Martyr* v. *Lawrence*, 10 Jur. N. S. 859.

(*g*) *Gennings* v. *Lake*, 3 Cro. 169; *Ongley* v. *Chambers*, 1 Bing. 496-499; but see *Jones* v. *Whelan*, 16 Ir. C. L. R. 495.

(*h*) *Doe* v. *Galloway*, 5 B. & Ad. 49; 2 N. & M. 241.

(*i*) *Morris* v. *Edgington*, 3 Taunt. 31; *Kooystra* v. *Lucas*, 5 B. & Ald. 834; *Harding* v. *Wilson*, 3 D. & R. 290; 2 B. & C. 96; *Maitland* v. *Mackinnon*, 1 H. & C. 607; 32 L. J. Ex. 49.

a right only, as we shall presently see, to use the subject-matter of the demise in the way in which it has been previously used and enjoyed. Many things, therefore, which pass by a grant in fee, so as to give the grantee an absolute dominion overt hem, do not pass by a lease so as to give the lessee a right to use and enjoy them as part of the proceeds and profits of the subject-matter of the demise. The lessee, for example, has a right only to the casual profits of trees; he has no right to cut them down and sever them from the freehold and inheritance. He has a right to the profits of mines and quarries opened at the time of the demise, but has no right to open fresh mines and quarries where none before existed.

Commencement and duration of leases.—Leases for lives, as well as leases for terms of years, may now be made to commence from a day that is passed, or from a day to come, as well as from the day of the making of the lease. If the lease is limited to commence "from the date," or "from the day of the date," the words are either inclusive or exclusive, according to the context and subject-matter of the written instrument, and the apparent intention of the contracting parties (*k*). A lease "from the day of the date," and "from henceforth," is the same thing; if, therefore, a lease be dated the 1st of December, and be granted to commence "from henceforth," and be sealed and delivered on the 12th of December, the lease commences in contemplation of law from the 1st of December (*l*). If in the case of a present demise no time is mentioned for the commencement of the lease, or if the date is an impossible date, the term will be deemed to begin from the day of the delivery of the deed, or of the making of the demise, if extrinsic circumstances do not rebut such a presumption (*m*). But it is otherwise in the case of an executory demise (*mm*). The commencement of the term is necessarily controlled and regulated by extrinsic circumstances as well as by the express terms and language of the deed. Where a lease was dated the 25th of March, 1783, and the term was granted to commence "from the 25th of March now last past," and it was proved that the deed was not executed until some time after the day on which it was dated, it was held that the term commenced on the 25th of March, 1783, and not on the 25th of March, 1782 (*n*). If the land is demised "for a year, and so on from year to year," or "for a year

(*k*) *Pugh* v. *Leeds, Duke of*, 2 Cowp. 714; and see *ante*, p. 194.

(*l*) *Llewelyn* v. *Williams*, Cro. Jac. 258.

(*m*) *Styles* v. *Wardle*, 4 B. & C. 908; 7 D. & R. 507; *Higham* v. *Cooks*, 4 Leon. 144; Co. Litt. 46, b.

(*mm*) *Marshall* v. *Berridge*, 19 Ch. D 233, overruling *Jaques* v. *Millar*, 6 Ch. D. 153.

(*n*) *Steele* v. *Mart* 6 D. & R. 392; 4 B. & C. 272.

and afterwards from year to year," this is a lease for two years certain at least (*o*). But, if the demise is from year to year, so long as both parties please, it is a lease only for a year certain, and is determinable at the end of the first as well as of any subsequent year (*p*). If the demise is for "one year certain," and six months' notice afterwards, the lease is only a lease for a year (*q*). If the land is expressed to be demised for years generally, the lease is said to be good for two years at the least (*r*). A house and land were demised for the term of six months, and so on from six months to six months, until one of the parties shall give the other six calendar months' notice of his intention to determine the tenancy, and it was held that this was a lease for one year at least (*s*).

If a lease is granted for seven, fourteen, or twenty-one years, and the lessee enters and takes possession of the demised premises, the legal construction of the lease is that the lessee is entitled at his option to take that term which is most beneficial to himself. The lessee therefore has the option, at the expiration of the first seven years, of continuing the lease on for another seven years; and, after that term has expired, for the full period of twenty-one years if he chooses so to do, the courts leaning in favour of that construction which is the most favourable to the lessee (*t*). Where the lessor agreed not to raise the rent nor turn the tenant out of possession so long as the rent was duly paid quarterly, it was held that this operated as an agreement for a tenancy from year to year. If in a lease under seal the lessor covenants not to raise the rent, nor turn out the tenant, so long as the rent is duly paid, this is a lease for life. If the undertaking is contained in a lease not under seal, it operates only as a simple contract or agreement, for a breach of which the tenant may recover damages from the lessor; but it does not prevent the latter from ejecting the tenant after the ordinary notice to quit (*u*). If the full extent and duration of the term are uncertain, but there is a certainty for some specific portion of time, the lease will be good for such term or portion of time, and void as to the residue (*x*). If no time at all is mentioned for the duration of the term, and there has been no entry upon the land nor payment of rent, there is no lease at all; but, if the lessee has actually entered and taken possession, the duration of

(*o*) Bac. Abr. Leases (L), 838; *Legg* v. *Strudwick*, 2 Salk. 414; 18 Hen. 8, 15, b.; *Denn* v. *Cartwright*, 4 East, 29; *Doe* v. *Green*, 9 Ad. & E. 658; 1 P. & D. 454.

(*p*) *Doe* v. *Smaridge*, 7 Q. B. 957.

(*q*) *Thompson* v. *Maberly*, 2 Camp. 573; *Jones* v. *Nixon*, 1 H. & C. 48; 31 L. J. C. P. 66.

(*r*) Bro. Abr. Lease, 13; 6 Co. 35, 36.

(*s*) *Reg.* v. *Chawton*, 1 Q. B. 247.

(*t*) *Dann* v. *Spurrier*, 3 B. & P. 404; *Doe* v. *Dixon*, 9 East, 15; *Goodright* v. *Richardson*, 3 T. R. 462.

(*u*) *Doe* v. *Browne*, 8 East, 165; see *Wood* v. *Beard*, 2 Ex. D. 30.

(*x*) *Gwynne* v. *Mainstone*, 3 C. & P. 302.

the term of hiring will be regulated by the nature of the subject-matter of the demise, the times limited for the payment of the rent, and the custom of the country where the property is situate.

Leases from year to year.—In the case of a general demise of farms or lands, no term or time of holding being mentioned, the presumption is by custom in favour of a yearly hiring (*y*) in the absence of an express limitation of the term. If a corn-field or an orchard is demised at a customary and ordinary rent, the hiring will be deemed to be for a year, and so on from year to year, in order that the tenant may reap the harvest and gather the fruits and produce of the soil when they come to perfection, as the rent is reasonably presumed to be paid for the enjoyment thereof, and not for the barren occupation of the land itself. "If the produce of the demised lands requires two years to come to perfection, as if it be liquorice, madder, &c., a general holding will, it seems, enure as a tenancy from two years to two years, and cannot be determined by a notice to quit at the end of the first or third year" (*z*). Where lands were demised to J. H., his heirs, executors, and assigns for ever, at a yearly rent, with a proviso for re-entry in case of non-payment of rent, it was held that the deed created only a tenancy from year to year (*a*). If an intended lessee enters into possession of realty under an agreement for a lease, he is tenant at will or tenant by sufferance until the lease is made; but, if he remains in possession and pays rent, he becomes tenant from year to year until the lease is duly executed according to the agreement (*b*). In such a case the tenant holds on such of the terms of the agreement as are applicable to a yearly tenancy; and, if he enters under an agreement for a seven years' lease by which he is to do certain repairs in the last year of the term, and holds during the whole of the seven years, he must do the repairs (*c*). And, if he holds over after the expiration of the term, and the landlord receives from him rent which has accrued due subsequently to the expiration of the lease, he becomes a tenant from year to year (*d*).

If a man takes possession of premises under an invalid lease from a tenant for life, and the remainderman accepts rent, or does any act recognising the party in possession as his tenant, the latter forthwith becomes a lessee from year to year (*e*), but the mere

(*y*) 13 Hen. 8, 15, b.; *Doe* v. *Watts*, 7 T. R. 85.

(*z*) Adams on Eject., 4th ed. 99; Poth., LOUAGE, partie, 1, ch. 2, art. 4, 28.

(*a*) *Doe* v. *Gardiner*, 12 C. B. 319.

(*b*) *Mann* v. *Lovejoy*, R. & M. 355; *Doe* v. *Pullen*, 8 Sc. 276; *Doe* v. *Smith*, 1 M. & R. 137; *Knight* v. *Benett*, 11 Moore, 225; 3 Bing. 361; *Doe* v. *Amey*, 12 Ad. & E. 476; 4 P. & D. 177; *Braythwayte* v. *Hitchcock*, 10 M. & W. 497.

(*c*) *Martin* v. *Smith*, L. R. 9 Ex. 50.

(*d*) *Bishop* v. *Howard*, 3 D. & R. 297; 2 B. & C. 100.

(*e*) *Doe* v. *Morse*, 1 B. & Ad. 369.

acceptance of two shillings and sixpence in a chief rent is not sufficient evidence of a tenancy from year to year (*f*). So, if a man enters into possession as an intended purchaser, and agrees "to pay and allow" to the vendor "at the rate of 100*l.* per annum from the time of taking possession of the premises until the completion of the purchase in equal half-yearly payments," he becomes tenant to the intended vendor "at a fixed rent of 100*l.* per annum, payable half-yearly" (*g*). A tenancy from year to year is ordinarily implied from the payment and acceptance of rent; but this *primâ facie* presumption may be rebutted by showing that the money was paid or received by mistake. Since the Judicature Act the rules of equity prevail; and if there is an agreement for a lease, the tenant holds under the terms of it before any payment of rent (*gg*). The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, has long been exploded (*h*). A tenancy from year to year re-commences every year (*i*). A demise by a tenant from year to year to another, also to hold from year to year, is, in contemplation of law, a demise from year to year during the continuance of the original demise to the intermediate landlord (*k*).

Half-yearly, quarterly, monthly, and weekly hirings.—If an annual rent is reserved, the holding is from year to year, although the contract of demise provides that the tenant shall quit at a quarter's notice. Such a contract differs only from the usual letting from year to year in the agreement by the parties to reduce the ordinary six months' notice to quit to three months. But, if it is expressly agreed that the tenant is always to be subject to quit at six months' notice given him at any time, this constitutes a half-yearly tenancy and the lessee will be presumed to hold from six months to six months from the time that he entered as tenant. If he is to hold until one of the parties shall give unto the other three months' notice to quit at the expiration of such notice, the tenancy will be a quarterly tenancy (*l*). In the case of a demise of an unfurnished mansion at an annual rent, payable half-yearly or quarterly, the hiring is a hiring from year to year. In the case of cottages or unfurnished apartments in a house demised at a monthly or weekly rent, the presumption is in favour of a monthly or a weekly tenancy. Where a wharf, warehouse, and buildings, were let on the terms that a quarter's rent

(*f*) *Smith* v. *Widlake*, 3 C. P. D. 10, C. A.

(*g*) *Saunders* v. *Musgrave*, 6 B. & C. 524; 9 D. R. 533.

(*gg*) *Walsh* v. *Lonsdale*, 21 Ch. D. 9.

(*h*) *Doe* v. *Browne*, 8 East, 167.

(*i*) *Tomkins* v. *Lawrance*, 8 C. & P. 731; *Gandy* v. *Jubber*, 33 L. J. Q. B. 151; *Doe* v. *Dobell*, 1 G. & Dav. 218; but this has been doubted, see *Bartlett* v. *Baker*, 34 L. J. Ex. 11.

(*k*) *Pike* v. *Eyre*, 9 B. & C. 909.

(*l*) *Doe* v. *Grafton*, 18 Q. B. 496; 21 L. J. Q. B. 276; *Kemp* v. *Derrett*, 3 Camp. 510.

should be paid down on the day of the commencement of the tenancy, and should be continued to be paid in advance during the continuance of the hiring, it was held that this was a quarterly, and not a yearly, hiring (*m*). There is no objection in law to a tenancy determinable by a week's notice to quit, and a reasonable time being allowed after the expiration of the notice for the tenant to remove his goods (*n*).

Tenancy at will.—If the lessor reserves to himself a right of re-entry at his own will and pleasure, or the lease contains an express stipulation to the effect that the tenancy may be put an end to at the will of either party, the holding is a tenancy at will (*o*). The reservation of a yearly or quarterly rent is not inconsistent with a tenancy at will (*p*). A mere permission to occupy creates a tenancy at will. If a tenant for years holds over after the expiration of his lease, or continues in possession pending a treaty for a further lease (*q*), or is admitted into possession pending a treaty for a purchase (*r*), he is strictly a tenant at the will of the landlord, and may be turned out of possession without notice to quit; but, if, during the continuance of such tenancy at will, the tenant has offered, and the landlord has accepted, rent for the use of the property, the law infers that a yearly tenancy was meant to be created between them (*s*). A minister of a dissenting congregation, placed in the possession of a chapel and dwelling-house by trustees in whom the property is vested in trust to permit the chapel and dwelling-house to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined *instanter* by a demand of possession (*t*). A tenant at will is entitled to retain possession of the land he holds until the lessor has made a demand of possession (*u*), or has intimated, either by express words or by his conduct and actions, his determination to put an end to the tenancy. The holding may be determined by a letter, stating that, unless the tenant pays the lessor what he owes him, he will, without delay, take measures for recovering possession of the property (*x*), or by a demand of possession on the part of the landlord (*y*), or by his

(*m*) *Wilkinson* v. *Hall*, 4 Sc. 301; *Towne* v. *Campbell*, 3 C. B. 921.

(*n*) *Cornish* v. *Stubbs*, L. R. 5 C. P. 334; 39 L. J. C. P. 202.

(*o*) *Richardson* v. *Langridge*, 4 Taunt. 131; *Cudlip* v. *Rundal*, 4 Mod. 12; 3 Salk. 156; *Bayley* v. *Fitzmaurice*, 8 Ell. & Bl. 679.

(*p*) Litt. sec. 72; *Doe* v. *Davies*, 7 Exch. 91; 21 L. J. Ex. 60; *Doe* v. *Cox*, 11 Q. B. 122; 17 L. J. Q. B. 3.

(*q*) Com. Dig. tit. Estates (H. 1); *Doe* v. *Stennet*, 2 Esp. 717.

(*r*) *Doe* v. *Chamberlaine*, 5 M. & W. 14.

(*s*) *Clayton* v. *Blakey*, 8 T. R. 3.

(*t*) *Doe* v. *M'Kaeg*, 10 B. & C. 721; 5 M. & R. 620; *Doe* v. *Jones*, 10 B. & C. 718; 5 M. & R. 616. 752; *Revett* v. *Brown*, 2 Moo. & P. 12; 5 Bing. 7.

(*u*) *Right* v. *Beard*, 13 East, 210.

(*x*) *Doe* v. *Price*, 2 M. & Sc. 464; 9 Bing. 356.

(*y*) *Locke* v. *Matthews*, 13 C. B. N. S. 753.

entry on the land without the tenant's consent and making livery of seisin to another (*z*), or exercising acts of ownership; also by his alienation of the reversion; by the tenant's quitting the premises; by the death of either of the parties; by the bankruptcy of the lessor; and, in short, by the doing of any act which amounts to a determination of the will on either side. But a tenant at will cannot determine his tenancy by transferring his interest to a third party, without notice to his landlord (*a*). If the will is determined, and the landlord's consent to the occupation is withdrawn, so as to create an adverse possession, and the landlord afterwards does any act fairly leading to the presumption that he has renewed his consent to the holding, a fresh tenancy at will is created between the parties (*b*).

Tenancy by sufferance.—When the landlord has demanded possession, or has done any act which is tantamount to a determination of the will, or when the tenant holds over at the expiration of a lease against the will of the lord, or after the expiration of a notice to quit, the tenant is said to be a tenant at sufferance in contradistinction to a tenant at will (*c*). The expression, however, is not calculated to give a correct idea of the nature of the holding, and does not seem to have been very happily chosen. Although termed tenant by sufferance, he is understood to hold wrongfully and against the will, and contrary to the permission, of the landlord. He has, consequently, no estate or interest at all in the land; and an action of ejectment may at any time be brought against him without notice or demand of possession; and, if the lord can get possession peaceably, he is entitled to take and retain possession, and so oust the wrongdoer (*d*). The difference, therefore, between a tenancy at will and what is called a tenancy by sufferance is that, in the one case, the tenant holds by right, and has an estate or term in the land, precarious though it be, and the relationship of lessor and lessee subsists between the parties; in the other, the tenant holds wrongfully and against the will and permission of the lord, and has no estate at all in the occupied premises. When a tenancy at sufferance has existed for twenty years (now twelve), the landlord's right of entry is barred by statute, and the tenant becomes the absolute and complete owner of the property (*e*).

Leases under powers.—If a lease granted in the intended exercise of a power of leasing is invalid by reason of the non-

(*z*) *Ball* v. *Cullimore*, 2 C. M. & R. 120.

(*a*) *Pinhorn* v. *Souster*, 8 Exch. 772.

(*b*) *Doe* v. *Turner*, 7 M. & W. 232; *Turner* v. *Doe*, 9 M. & W. 644; *Doe* v. *Thomas*, 6 Exch. 854; *Randall* v. *Stephens*, 23 L. T. R. 211.

(*c*) Co. Litt. 57, b.

(*d*) *Fox* v. *Oakley*, Peake's Ad. Ca. 214.

(*e*) *Doe* v. *Gower*, 21 L. J. Q. B. 57; 37 & 38 Vict. c. 57, s. 1.

observance of the terms of the power, such lease, if made *bonâ fide*, and if the lessee has entered thereunder, is deemed a contract or agreement to grant the lease, and all persons who would have been bound by the lease, if lawfully granted under the power, will be bound by such contract. Acceptance of rent under such invalid lease is a confirmation of the lease as against the person so accepting rent. Leases, also, invalid at the time of the grant thereof, may become valid, if the grantor subsequently acquires the requisite power of leasing (*f*).

Demise of tolls.—The 8 & 9 Vict. c. 106, s. 3, which provides that a lease required by law to be in writing of any tenements, &c., shall be void, unless made by deed, does not apply to agreements for letting tolls under the 3 Geo. 4, c. 126 (*g*).

Rights and liabilities of lessor and lessee.—Every lessor binds himself to give possession and not to give the party to whom he demises a mere right to take possession from a wrong-doer by an action of ejectment (*h*); and every lessee binds himself to accept possession and pay rent (*i*). If a party has agreed to take a house from a particular day, provided certain things are before then done by the landlord, and the things are not done, he may decline to go on with the contract, and may refuse to take possession (*k*). A lessee who has contracted orally for the hire of realty, and who neglects or refuses to accept possession of the demised premises, cannot, as we have seen (*ante*, p. 159), be sued upon such oral agreement for damages for not taking possession, nor upon any oral promise to pay rent, nor for use and occupation. In the case of leases under seal, the law implies from the words "yielding and paying," or any equivalent words amounting to a reservation of rent, a covenant on the part of the lessee to pay the rent so reserved, and, in the case of parol leases, a promise to the like effect (*l*). But the liability of a lessee upon all express and implied covenants and agreements for the payment of rent is dependent upon his being put into possession, or being tendered and offered and afforded the power and opportunity of taking possession of the demised premises (*m*). The quiet enjoyment also by the lessee, as against the lessor and all that come in under him by title, and against others claiming by title paramount, during the time in respect of which the rent is claimed to have

(*f*) 12 & 13 Vict. c. 26; 13 Vict. c. 17.

(*g*) *Shepherd* v. *Hodsman*, 18 Q. B. 216; 21 L. J. Q. B. 263.

(*h*) *Coe* v. *Clay*, 3 Moo. & P. 59; 5 Bing. 440; *Jinks* v. *Edwards*, 11 Exch. 775; *Neale* v. *Mackenzie*, 1 M. & W. 747; Bract. lib. 2, c. 28, fol. 62. As to agreements for a lease, see *Drury* v. *Macnamara*, 5 El. & Bl. 616; 25 L. J. Q. B. 5.

(*i*) *Stanley* v. *Hayes*, 3 Q. B. 105.

(*k*) *Tidey* v. *Mollett*, *ante*, p. 179.

(*l*) Bac. Abr. LEASES, 633; COVENANT, B. 342.

(*m*) *Holgate* v. *Kay*, 1 C. & Kirw. 341.

accrued due, is a condition precedent to the tenant's liability for the payment of such rent. But the tenant is not released from liability by reason of a mere constructive eviction (*n*), or a disturbance and interruption from a mere wrong-doer.

Covenants for quiet enjoyment.—From the use by a grantor of certain words having a known legal operation in the creation of an estate the law infers a covenant on the part of such grantor to protect and preserve the estate so created; as, if a man by deed demises land for years, the word "demise" imports or makes a covenant in law for quiet enjoyment (*o*). If by the term of a lease the lessor "warrants" the demised premises to the lessee, this amounts to an express covenant for quiet enjoyment during the whole term granted by the lease (*p*). Covenants for quiet enjoyment are broken, if the lessor builds on his own adjoining land so as to darken the lessee's windows, or does anything thereon which creates a nuisance. The erection of a gate across a lane through which the tenant has a way to the demised premises is a breach of a covenant for quiet enjoyment (*q*); and so is the placing of any structure upon any part of the demised premises (*r*). The covenant is prospective and is only a covenant that from the time of granting the lease the premises shall not be obstructed by any act done thereafter (*s*), or by the probable or necessary consequence of any act done before the granting of the lease (*t*). The usual express covenant by the lessor that the lessee shall quietly enjoy, &c., without interruption or disturbance by the lessor or any person claiming under him, is not broken by an entry on the tenant by the land-tax collector to distrain for arrears of land-tax due from the lessor, the disturbance not being by a person claiming by title from the lessor (*u*). And, where a covenant for quiet enjoyment is accompanied by a covenant by the lessee not to use the land for certain purposes, the first covenant does not guarantee to the tenant that he may lawfully use the land for any purpose not included in the restrictions in the lease (*x*). So also an express covenant that an under-lessee should deliver up all landlord's fixtures at the end of the term does not raise an implied covenant that he may remove trade fixtures (*y*). Whenever a person

(*n*) *Delancy* v. *Fox*, *ante*, p. 213.

(*o*) *Hall* v. *City of London Brewery Co.*, 2 B. & S. 737; 31 L. J. Q. B. 257.

(*p*) *Williams* v. *Burrell*, *ante*, p. 169.

(*q*) *Andrews* v. *Paradise*, 8 Mod. 319; *Morris* v. *Edgington*, 3 Taunt. 24.

(*r*) *Kidder* v. *West*, 3 Lev. 167.

(*s*) *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602, C. A.

(*t*) *Shaw* v. *Stenton*, 2 H. & N. 858.

(*u*) *Stanley* v. *Hayes*, 3 Q. B. 105. As to an implied covenant for title on the part of the lessor, or that he has power to grant an interest co-extensive with that which he assumes to grant, see *Line* v. *Stephenson*, 7 Sc. 69; *Bandy* v. *Cartwright*, 8 Exch. 913; *Stranks* v. *St. John*, L. R. 2 C. P. 376; 36 L. J. C. P. 118.

(*x*) *Dennett* v. *Atherton*, L. R. 7 Q. B. 316; 4 L. J. Q. B. 165.

(*y*) *Porter* v. *Drew*, 5 C. P. D. 143.

demises the surface of land, reserving a right to win and work minerals, he cannot exercise the right so as to let down or injure the surface; for that would be derogating from his own grant, and would also be a breach of a covenant for quiet enjoyment (z).

Covenants for the payment of rent.—A covenant for the payment of rent at a specified time, when no place of payment is mentioned, is analogous to a covenant to pay a sum of money in gross on a day certain; and it is accordingly incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money (a). If the tenancy is a yearly tenancy, and no time is specified for the payment of the rent, the rent will be due once a year (b). If the rent is to be paid free of all outgoings, it must be paid free of land-tax and tithe commutation rent-charge (c). Where the lessor let his land at a rent payable quarterly, and afterwards mortgaged it, but remained in possession, and obtained from the lessee, who had no notice of the mortgage, a year's rent in advance, it was held that the payment of the rent before it became due was not a good payment as against the mortgagee, who, before the rent became due, gave the lessee notice to pay the rent to him (d).

Covenants not to "let, set, or demise," restrain an assignment (e); and covenants not to "let or assign" (f), or not to "assign or otherwise part with," the demised premises (g), restrain an underlease; but a covenant not to "grant any underlease, or let, assign, or otherwise part with the demised premises or any part thereof," is not broken by taking in a lodger who has the exclusive possession of the room he occupies (h). Where a lessee took a person into partnership, and agreed that he should have the exclusive use of a back chamber and some other parts of the demised premises, and the joint use of the rest, it was held that the covenant had been broken, and that the right to re-enter had accrued (i). And, in the case of a lease to two partners, an assignment by one partner of his undivided moiety of the lease to the other partner is a breach of a covenant not to assign (k). A covenant by a lessee that he will not let or underlet for more than a year does not prevent him from granting leases to commence at a

(z) *Proud* v. *Bates*, 34 L. J. Ch. 406. As to what is included under the term "minerals," see *Bell* v. *Wilson*, L. R. 1 Ch. 303; 34 L. J. Ch. 572.

(a) *Haldane* v. *Johnson*, 8 Exch. 689.

(b) *Collett* v. *Curling*, 10 Q. B. 785.

(c) *Parish* v. *Sleeman*, 1 De G. F. & J. 326; 29 L. J. Ch. 96; *Sweet* v. *Seager*, 2 C. B. N. S. 119.

(d) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *Cook* v. *Guerra*, L. R. 7 C. P. 132; 41 L. J. C. P. 89.

(e) *Greenaway* v. *Adams*, 12 Ves. 395.

(f) *Roe* v. *Harrison*, 2 T. R. 425.

(g) *Doe* v. *Worsley*, 1 Campb. 20.

(h) *Doe* v. *Laming*, 4 Campb. 77.

(i) *Doe* v. *Sales*, 1 M. & S. 297.

(k) See *Corporation of Bristol* v. *Westcott*, 12 Ch. D. 461; *Varley* v. *Coppard*, L. R. 7 C. P. 505.

future day (*l*). A devise of the term to a stranger is an assignment within the meaning of the proviso or covenant, but not a devise to the lessee's own executor (*m*), nor an assignment by act and operation of law (*n*), or by the act of God, or an assignment by the sheriff under an execution, unless the execution has been obtained by collusion with the creditor in fraud of the covenant (*o*). If the lessee does assign or underlet, notwithstanding his covenant, the assignment or underlease is good, and the lessee is only liable to an action on his covenant (*p*), unless there is a proviso in the original lease for re-entry in case of a breach of the covenant (*q*). Where the lessee covenants not to assign without the consent of the lessor "such consent not to be arbitrarily withheld," these words do not amount to a covenant by the lessor to give his consent; but an arbitrary refusal would leave the lessee at liberty to assign without consent (*r*). And where the lessor's consent is not to be withheld from any assignment or underlease to a respectable and responsible person, an assignment or underlease to such a person does not require the lessor's consent (*s*). Where a lessee under such a covenant contracted to assign subject to his landlord's approval, and he would not give leave, it was held that the lessee was not bound to take legal proceedings to compel his landlord to consent, but might consider his contract with the third party at an end (*t*). A covenant not to assign is not a usual covenant (*u*).

Non-execution of the lease by the lessee.—A person who has neither sealed and delivered an indenture of lease, nor entered and taken possession under it, cannot be made responsible upon the covenants contained in the indenture; but, if he enters and takes possession by force of the lease, he is deemed in law to have covenanted to hold upon the terms of the indenture, and to observe the conditions of the lease, and the lessor, therefore, may distrain or bring an action for the arrears of rent (*x*). For every grantor of an estate may annex his own terms and conditions to the grant, which will constitute a covenant annexed to the estate, so that whosoever accepts the estate will be bound by the covenant, although he has not sealed and delivered any deed. If land is leased to two for a term of years, and one puts his seal, and the

(*l*) *Croft* v. *Lumley*, 6 H. L. C. 737; 27 L. J. Q. B. 330.

(*m*) Bac. Abr. LEASE, T.

(*n*) *Goring* v. *Warner*, 7 Vin. Abr. 85, pl. 9; *Doe* v. *Smith*, 5 Taunt 795.

(*o*) *Doe* v. *Carter*, 8 T. R. 57, 300.

(*p*) *Paul* v. *Nurse*, 8 B. & C. 486.

(*q*) *Roe* v. *Harrison*, 2 T. R 428.

(*r*) *Treloar* v. *Bigge*, L. R. 9 Ex. 151; *Lehmann* v. *McArthur*, L. R. 3 Ch. 496; *Sear* v. *House Property Soc.*, 16 Ch. D. 387.

(*s*) *Hyde* v. *Warden*, 3 Ex. D. 72, C. A.

(*t*) *Lehmann* v. *McArthur*, *supra*.

(*u*) *Hampshire* v. *Wickens*, 7 Ch. D. 555; *Wilson* v. *Redhead*, 28 W. R. 795; Smith and Soden's Landlord and Tenant, 2nd ed. 87.

(*x*) *Brett* v. *Cumberland*, 2 Roll. Rep. 63; Litt. sec. 374, 58; *Mayor, &c. of Lyme* v. *Henley*, 1 Bing. N. C. 237; *Gregg* v. *Coates*, 23 Beav. 89.

other agrees to this lease, and enters and takes the profits with him, he shall be charged to pay the rent, though he has not put his seal to the deed; but, if there is a condition comprised in the deed which is not parcel of the lease, but a condition in gross, if he does not put his seal to the deed, though he is a party to the lease, he is not a party to the condition (*y*). Where three were enfeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and two of the feoffees only sealed the deed, and the third entered and agreed to the estate conveyed by the deed, he was held bound in a writ of covenant (*z*). Where three windmills were demised by letters-patent under seal, which letters-patent contained a clause to the effect that the lessee and his assignees should repair and maintain the windmills during the term, and yield them up in good condition at the expiration thereof, and the lessee entered under the grant and took possession of the windmills, it was held that there resulted from the acceptance of the estate an express covenant to repair, which was annexed to the term granted, and ran with the land, and bound both the lessee and his assignees by reason of the privity of estate (*a*). Where a lessee entered into possession of a house under an agreement to repair, and paid rent, and the lessor sold the estate and assigned all his interest to the plaintiff, and the lessee continued to occupy and paid rent to the plaintiff, it was held that the lessee must be presumed, in the absence of evidence to the contrary, to have agreed to continue to hold of the plaintiff on the same terms as he held of the original lessor, and that he was therefore responsible to the plaintiff for a breach of his agreement to repair (*b*).

Non-execution of the lease by the lessor.—It is said that, "if an indenture of lease be sealed only on the part of the lessee, and not on the part of the lessor, *nihil operat*, neither in respect of the interest nor in respect of the covenants, for the covenants depend upon the lease, and if there is no lease there is no covenant; for, if the lease had been made and afterwards surrendered, all the covenants had been void" (*c*). Where an indenture of demise for the term of eleven years, containing covenants to pay rent and repair, was executed by the lessee alone, and the latter entered and took possession and paid rent for several years, and the lessor assigned his reversion without ever having executed the lease, it was held that the assignee of the reversion could not sue upon any of the covenants of the lease, as the lease for eleven years to which they were annexed had never been created; that the only rever-

(*y*) 38 Ed. 3, p. 8; Bro. Abr. Dett. pl. 80; Fitz. Abr. Dett. pl. 117; Co. Litt. 231, b.

(*z*) 2 Roll. Rep. 62.

(*a*) *Brett* v. *Cumberland*, 2 Roll. Rep. 63.

(*b*) *Arden* v. *Sullivan*, 14 Q. B. 832.

(*c*) *Soprani* v. *Skurro*, Yelv. 18.

sion which could carry with it the right to sue upon the covenant was a reversion expectant upon the determination of the term for eleven years, which reversion had never been in existence by reason of the non-execution of the lease by the lessor (*d*). But, as between the original parties, where a privity of contract exists between them, the lessee may, under certain circumstances, be held liable upon the covenants contained in the indenture, though the lease has not been executed by the lessor and the term created. It has been said that every lease must be construed in connection with surrounding circumstances, and that a lessee may, by entering upon, and taking possession of, tenements under an indenture sealed by him, and by dispensing with the execution of the indenture by the lessor, render himself liable to be sued upon his covenants, as independent covenants, on the ground that a party may waive a condition in his favour and dispense with its performance; and that, if a lessee executes his part of an indenture of lease, and enters and takes possession of the demised premises, and has the use of them, and gathers all the produce and profits of the soil for the whole term intended to be granted without ever having required the lessor to execute the indenture, he ought in justice to be deemed to have waived his right to treat the execution of the lease by the lessor as a condition precedent to his liability upon his covenants; and the Court of Queen's Bench has held that a lessee who has executed an indenture of demise containing a covenant to repair, and has entered and enjoyed for the whole term intended to be granted, is liable on his covenant, though the lease has never been executed by the lessor, and that the covenant becomes, under such circumstances, an independent covenant within the rule laid down in Comyn's Digest (*e*); that, if one party executes his part of an indenture, it shall be his deed, though the other does not execute his part (*f*). But the Court of Exchequer has held that the entry and taking of possession by the lessee before the execution of the lease by the lessor do not render the covenants to pay rent and repair independent covenants (*g*).

Concealment of latent defects.—By the civil and continental law, "the lessor is bound to make known to the lessee all defects in the thing which he lets, and to explain everything that may give occasion to error or mistake" (*h*). But by our law, in contracts for the letting and hiring of realty, the lessor is not bound to disclose to the lessee latent defects interfering with the use and

(*d*) *Cardwell* v. *Lucas*, 2 M. & W. 123.
(*e*) Com. Dig. Fait (C.), 2.
(*f*) *Cooch* v. *Goodman*, 2 Q. B. 599; Littledale, J., 1 Ad. & E. 55; *Hughes* v. *Clark*, 10 C. B. 905.
(*g*) *Pitman* v. *Woodbury*, 3 Exch. 12; *Swatman* v. *Ambler*, 8 *ib.* 80; and see *How* v. *Greek*, 34 L. J. Ex. 4.
(*h*) Domat. liv. 1, tit. 3, ss. 8, 10.

enjoyment of the property let to hire (i). A lessor of a house, for example, who knows that the house is in a ruinous and dangerous state and unfit for occupation, is not bound to disclose the fact to his lessee at the time that he grants the lease (k).

Having executed the lease, and put the lessee into possession of the demised premises, or placed them at his disposal, and clothed him with the legal title to the possession and occupation thereof for the term granted by the lease, the lessor has done all that is necessary for him to do to entitle himself to the rent at the time that it is made due and payable; he does not, in the case of demises of realty, warrant that the premises are, at the time of the demise, or that they shall continue to be during the term, in any particular state or condition, or fit for any particular purpose; and the lessee, therefore, is bound to pay his rent, although the subject-matter of the demise is not fit for the purpose for which he required it, and although he may have had no beneficial use or enjoyment of it. If, indeed, the lessor has been guilty of any fraudulent concealment of defects which ought in good faith to have been disclosed, or has resorted to any misrepresentation calculated to mislead the lessee in some important particular as to the condition of the demised premises, the contract will be void, and the lessee will be discharged from the rent; but, in the absence of all fraud and deceit, he is bound by his express covenant or contract, and must pay his rent, although he has not had that beneficial use and enjoyment of the demised premises which was anticipated. Thus, there is no implied warranty on the part of a lessor who lets land for agricultural purposes, that no noxious plants are growing on the demised premises (l). And, where the defendant took the eatage of a meadow from the plaintiff for the term of six months, at a rent of 40*l.*, and turned fifteen head of cattle into the meadow, eight of which died from the poisonous effects of a quantity of refuse paint which had been placed on a manure heap, and had inadvertently been spread over the grass prior to the defendant's occupation, and had afterwards been eaten by the cattle; and the defendant then took his stock off the land, and tendered back the possession of the meadow to the plaintiff, which she refused to receive; it was held that the defendant was liable for the rent at the time it became due, although the eddish at the time of the demise was wholly unfit for the purpose for which it was taken, and the defendant had not had any beneficial use or enjoyment of it (m).

(i) *Hart* v. *Windsor*, 12 M. & W. 68; *Cornfoot* v. *Fowke*, 6 M. & W. 358.

(k) *Keates* v. *Earl Cadogan*, 10 C. B. 591; 20 L. J. C. P. 76.

(l) *Erskine* v. *Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835.

(m) *Sutton* v. *Temple*, 12 M. & W. 52; 27 Hen. 6 (Trin. Term), fol. 10, pl. 6; Hil. Term, 14 Hen. 4, fol. 27, pl. 35; Bro. Abr. (Dette), pl. 18, fol. 220.

Demises of uninhabitable houses.—Rooms infested with bugs.—Where an action was brought for the non-payment of the rent of a house, and the defendant pleaded that the house was demised to him for the purpose of his inhabiting the same, and that, at the time of the demise and of his taking possession, and from thence until he quitted, the house was unfit for habitation, and he could not dwell therein, or have any beneficial use or occupation thereof, by reason of its being greatly infested with bugs, without any default on his part, and that, before the rent became due, and as soon as he discovered the condition of the tenement, he quitted it, and gave notice to the plaintiff, and tendered him the possession thereof; it was held that the plea was no answer to the action, inasmuch as the law, in the case of demises of unfurnished houses, implies no warranty or engagement on the part of the lessor that the house is at the time of the demise, or at the commencement of the term, in a fit and proper state and condition for habitation (*n*).

Payment of rent.—Although, therefore, houses become ruinous and fall down, and buildings, fences and superstructures erected upon the soil, and crops growing thereon, be destroyed by floods, or burned by lightning or accidental fire, or be thrown down by enemies, yet is the tenant liable to pay the rent so long as the land remains to him, and his legal title to the occupation and use thereof continues (*o*). If the landlord is bound by custom, or has entered into an express covenant to repair and uphold a house demised by him, and the lessee covenants to pay rent, the covenants are independent covenants, and the repairing and upholding of the house by the lessor is not a condition precedent to the liability of the lessee upon his covenant (*p*).

Payment of rent.—Exception of damage by fire.—If the lessee has covenanted to pay rent, "damage by fire excepted," and part of the demised premises is destroyed or injured by fire, the whole of the rent is not thereby suspended, but the tenant is entitled to a reasonable abatement (*q*). And, if the lessee covenants to pay rent, and also to repair, with an express exception of casualties by fire and tempest, the exception is confined to the covenant to repair, and does not qualify or affect the liability upon

(*n*) *Hart* v. *Windsor*, 12 M. & W. 68; *Manchester Warehouse Co.* v. *Carr*, 5 C. P. D. 507; as to bugs in furnished lodgings, see *Smith* v. *Marables*, *post*, p. 294.

(*o*) *Carter* v. *Cummins*, cited 1 Ch. C. 84; *Pindar* v. *Ainsley*, cited 1 T. R. 312; *Bayne* v. *Walker*, 3 Dow. 233; *Leeds* v. *Cheetham*, 1 Sim. 146; *Arden* v. *Pullen*, 10 M. & W. 321; *Marquis of Bute* v. *Thompson*, 13 M. & W. 493, 494; *Lofft* v. *Dennis*, 1 Ell. & Ell. 481; 28 L. J. Q. B. 168; *Surplice* v. *Farnsworth*, 7 M. & Gr. 579; 8 Sc. N. R. 307.

(*p*) T. Term, 27 Hen. 6, fol. 10, pl. 6; Bro. Abr. Dette, pl. 18; *Surplice* v. *Farnsworth*, 8 Sc. N. R. 307; 7 M. & Gr. 584.

(*q*) *Bennett* v. *Ireland*, E. B. & E. 326.

the covenant to pay rent, unless it has been extended thereto by express words (r).

Payment of rent.—Extinction and suspension of the rent by eviction.—If the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended; but the act must be something of a grave and permanent character, dispossessing the tenant, and not a mere temporary trespass (s); and there must be an actual dispossession of the tenant, and not a mere constructive eviction (t). The tenant is not released from liability by reason of an eviction by a mere wrong-doer and trespasser who has no title at all to the possession of the demised premises. Thus, where an action of debt was brought for three years' arrears of rent reserved upon a lease of a farm, and the defendant pleaded that Prince Rupert, an alien and enemy of the king, invaded the realm, and with divers armed men did enter upon the demised premises, and expel him therefrom, and keep him out, so that he could not enjoy the lands during the term, "it was resolved that the matter of the plea was insufficient." And this distinction was taken that, where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but, when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. Another reason was added that, as the lessee is to have the advantage of casual profits, he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor (u). So, where the parliament, during the civil wars, took possession of a house which had been demised to a lessee for a term of years, and turned it into an hospital for sick and maimed soldiers, and so prevented the lessee from having any beneficial occupation thereof for several years, notwithstanding which the lessor brought an action of debt for the rent, no question appears to have been made but that the lessee was bound at common law to make good the rent; and the lessee consequently brought his bill in equity for relief, on the ground that he had no remedy over against the wrong-doer, because it was an act of force in the parliament, which had been pardoned by the act of oblivion; but it does not appear that he got relief even in equity (x).

(r) *Monk* v. *Cooper*, 2 Str. 763, *Belfour* v. *Weston*, 1 T. R. 310.

(s) *Upton* v. *Townend*, 17 C. B. 64, *Carpenter* v. *Parker*, 3 C. B. N. S. 238.

(t) *Delaney* v. *Fox*, *ante*, p. 213, *Wheeler* v. *Steverson*, 30 L. J. Ex. 46, 6 H. & N. 158.

(u) *Paradine* v *Jane*, Aleyn. 27; Sty. 47, *Barnett* v *Dutton*, 4 Campb. 333; *Maryon* v. *Carter*, 4 C. & P. 295; *Hills* v. *Sughrue*, 15 M. & W. 253; *Jervis* v. *Tomkinson*, 1 H. & N 195; *Brown* v. *Royal Insurance Soc.*, 28 L. J. Q. B. 277.

(x) *Harrison* v. *Lord North*, 1 Ch. Ca.

Payment of rent.—Eviction by railway companies under statutory powers.—If the tenant is lawfully evicted by a railway company under the powers of its Act, the tenant is discharged from the accruing rent, but not from rent that was due and in arrear at the time of the eviction. Where a yearly tenant received notice from a railway company to give up possession of certain land within six months from the notice, and the notice expired in the middle of a half-year, and the tenant gave up possession to the company without obtaining or requiring compensation in respect of his unexpired term and interest in the premises, it was held that he was liable to his landlord for the whole of the half-year's rent (*y*). When a certain portion only of lands or tenements held by tenants or lessees has been taken by a railway company under the powers of its Act, the rent is to be apportioned; and the rent to be paid by the tenant for the residue of the lands not taken by the company must be settled by agreement of the parties, or by two justices, or by a jury (*z*).

Payment of rent.—Assignment of reversion.—If the lessor, after granting the lease, sells and conveys all his estate and interest in the demised premises, he has no longer any right to the accruing rent. The rent passes with the reversion to the lessor's grantee without any attornment on the part of the tenant; but the tenant is not to be prejudiced or damaged by payment of rent to the lessor, or by breach of any condition for non-payment of rent before notice of the transfer and conveyance has been given to him by the grantee (*a*). Prepayment is a good discharge for all rent which has become due before notice of the transfer (*b*), but not for rent which becomes due after notice (*c*).

Payment of ground-rent by the tenant.—Deduction thereof from the tenant's rent.—The immediate landlord is by the common law bound to protect his tenant from all paramount claims; and, when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is impliedly authorised to make the payment on the landlord's behalf; and the courts have held such payments to be payments in satisfaction of

84; as to proof of expulsion, see *Mayor, &c., of Poole* v. *Whitt*, 15 M. & W. 577; as to evidence of eviction, see *Morrison* v. *Chadwick*, 7 C. B. 283; 18 L. J. C. P. 193; *Henderson* v. *Mears*, 28 L. J. Q. B. 305; *Wheeler* v. *Steverson*, 6 H. & N. 158; 30 L. J. Ex. 46.

(*y*) *Wainwright* v. *Ramsden*, 5 M. & W. 602; *post*, NOTICE TO QUIT, p. 269.

(*z*) 8 & 9 Vict. c. 18, s. 119; Bac. Abr. RENT, M.; *In re Ware*, 9 Exch. 395.

(*a*) 4 Ann. c. 16, ss. 9, 10. See *Allcock* v. *Moorhouse*, 9 Q. B. D. 366.

(*b*) *Cook* v. *Guerra*, L. R. 7 C. P. 132; 41 L. J. C. P. 89.

(*c*) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *ante* p. 223.

rent due, or accruing due, to the immediate landlord. Thus, a tenant who has been compelled by a superior landlord, or other incumbrancer having a title paramount to that of his immediate landlord, to pay sums due for ground-rent or other like charges, may treat such payments as payments in satisfaction or part satisfaction of rent due to his immediate landlord (*d*). But the tenant should deduct those payments from the next rent that becomes due, or from the rent of the current year; for, if he allows several payments of rent to pass without giving his immediate landlord notice of the payment, and claiming the deduction, he will lose his right to deduct the money he has paid from the rent (*e*). Payments of money on account of the landlord, not charged upon the demised premises and leviable upon the chattels of the occupier, cannot be given in evidence in satisfaction and discharge of the rent, unless they were expressly directed or sanctioned by the landlord (*f*). The Tithe Commutation Acts do not impose any personal liability on the landlord to pay the tithe rent-charge (*g*).

Deduction of income-tax, land-tax, sewers-rate, and other outgoings from the rent.—As regards land-tax, paving-rates, and property and income-tax, charged on land demised to a tenant (*h*), the tenant ought to deduct the tax or rate out of the next rent that becomes due. If he fails to do this, he cannot deduct it from subsequent rent, nor can he recover it by action from the landlord (*i*). If the landlord is entitled to be relieved from the assessment, it is his duty to take the necessary steps for the purpose; and, if, before he has done this, the assessment is made on the occupier, and the tax paid, it may be deducted from the rent, although at the time the deduction is made the landlord has obtained his exemption from the tax (*k*). The landlord is in general liable to pay taxes in proportion to the rent reserved, and not to the improved value. Where, therefore, a tenant built on land demised to him, and raised the annual value from 60*l.* to 300*l.*, it was held that he was only entitled to deduct sewers-rate and land-tax upon the original rent, and that he was himself properly chargeable in respect of the improved value (*l*). Where the lessor was also the owner of the tithe rent-charge upon the land, it was held that a covenant to pay "all taxes and assessments whatsoever for or in respect of the demised premises, save and

(*d*) *Graham* v. *Allsopp*, 3 Exch. 198; *Taylor* v. *Zamira*, 6 Taunt. 524; *Jones* v. *Morris*, 3 Exch. 742.

(*e*) *Andrew* v. *Hancock*, 3 Moore, 278; *Spragg* v. *Hammond*, 4 Moore, 440.

(*f*) *Davies* v. *Stacey*, 12 Ad. & E. 511.

(*g*) *Griffinhoofe* v. *Daubuz*, 4 E. & B. 235.

(*h*) 5 & 6 Vict. c. 35, ss. 60, 103; 16 & 17 Vict. c. 34, s. 40; 27 & 28 Vict. c. 18, s. 15.

(*i*) *Andrew* v. *Hancock*, *supra*; *Denby* v. *Moore*, 1 B. & Ald. 129; *Cumming* v. *Bedborough*, 15 M. & W. 438.

(*k*) *Swatman* v. *Ambler*, 24 L. J. Ex. 185.

(*l*) *Smith* v. *Humble*, 15 C. B. 321.

except the level-tax, property-tax, and land-tax," did not include the tithe rent-charge, and that the lessee was not bound to pay it (m). Where the lessee covenanted to pay the rent without any deduction, &c., and further "to pay all manner of taxes, &c., charges and impositions whatever, &c., imposed by the authority of parliament or otherwise howsoever," and the lessor was compelled under an Act to abate a nuisance from bad drainage, it was held that he was not entitled to call upon the lessee to pay (n). An agreement by the landlord to repay the tenant all sums which he shall pay for the landlord's property-tax if the tenant will pay his rent in full without any deduction of landlord's property-tax, is good notwithstanding the provisions of the statute (o).

The Roman law, in its exposition and enforcement of leases, was much more favourable to the tenant than our own law. There the enjoyment of the thing for the use of which the rent was agreed to be paid was a condition precedent to the lessor's right to demand the rent. If, for example, the tenant was evicted by irresistible force, and kept out of possession, without any default on his own part, he was discharged from the rent, whether the eviction was the act of the lessor himself or of persons having title, or the act of mere wrongdoers. If a house demised to a tenant for habitation became ruinous and uninhabitable; if the windows were blocked up or darkened, and the tenant deprived of light and air by the raising of the roof of an adjoining house, or his use and enjoyment of the property were interfered with by a nuisance which he had no means of abating, he might quit the demised premises, vacate his lease, and refuse further payment of rent (p). If pasture land was demised for the purpose of feeding cattle, and poisonous herbs grew up and destroyed the beasts, the landlord lost his right to the rent (q). If lands were granted to farm for the term of one year only, and the tenant by reason of some inevitable accident, such as a volcanic eruption, an earthquake, a frost, a hail-storm, an inundation, or a hostile incursion, lost the whole of the produce of the soil, and reaped nothing, he was discharged from his rent (r). If a partial injury only had

(m) *Jeffrey* v. *Neale*, L. R. 6 C. P. 240, 40 L. J. C. P. 191.

(n) *Rawlings* v. *Briggs*, 3 C. P. D. 368, distinguishing *Thompson* v. *Lapworth*, L. R. 3 C. P. 149; see also *Hartley* v. *Hudson*, 4 C. P. D. 367. But see *Budd* v. *Marshall*, 5 C. P. D. 481, where Baggallay and Bramwell, L. JJ., held the contrary, Brett, L. J. diss.

(o) 5 & 6 Vict. c. 35, ss. 60, 103; *Lamb* v. *Brewster*, 4 Q. B. D. 220, C. A. 607, as to agreements to pay rates, including a rate under 37 & 38 Vict. c. 54, s. 3 (rating of mines), see *Chaloner* v. *Bolckow*, 3 Ap. Cas. 933.

(p) Dig. lib. 19, tit. 2, lex 15, s. 7, s. 1; lex 33, lex 25, s. 2; Cod. Civ. 1726, 1727.

(q) *Si saltum pascuum locasti in quo herba mala nascebatur, et pecora vel demortua sunt, vel deteriora facta, quod interest præstabitur, si scisti si ignorasti, pensionem non petes* Dig. lib. 19, tit. 2, lex 19, s. 1.

(r) *Ib.* lex 15, ss. 1, 2.

been sustained—if, for instance, the growing crops were damaged by an extraordinary drought, or the unusual inclemency of the weather—the lessee was entitled to a proportionable abatement of his rent. But, in order to sustain his claim for an abatement, he was bound to show that the loss arose from some unusual occurrence not reasonably to have been expected and contemplated by the parties at the time of the making of the contract. He was never granted an abatement of rent in respect of losses in any way attributable to his own want of diligence or skill, nor in respect of any accident which might reasonably have been foreseen and guarded against, nor for inconsiderable and trifling losses (s). And, in all leases for terms of years, the good years were to be taken with the bad years, so that the lessee could not claim to be excused from rent in respect of the total loss of the harvest in any one year of his tenancy, but could only claim the abatement towards the expiration of the term, upon a fair average of profit and loss (t).

Right to distrain for rent.—The law relating to distress will be found at the end of the present chapter, but the right to distrain for rent is here stated generally. The lessor's right to enter in person or by deputy upon the demised premises and distrain the goods and chattels of the tenant for rent or services in arrear has existed in this country from so early a period, "that we have no memorial of its original with us" (u). It was doubtless derived from the Roman law, which considered all the chattels and movables and personal property that the tenant brought upon the demised premises, and all the crops and fruits and produce of the soil growing or stored upon the land, to be hypothecated to the lessor as a security for the due payment of the rent, so that the lessor might, if rent was due and unpaid, enter upon the demised premises and take possession of such goods and chattels and produce, and hold the same as a security for the amount due (x). This power of entering upon the land and taking corporal possession of the pledge is impliedly accorded to the lessor on every demise of realty where there is an express reservation of, or an agreement by the tenant to pay, a fixed, ascertained rent or service (y). If there has been merely a permissive occupation of the property, without any previous payment of rent referable to some certain term of hiring, or to some

(s) Domat (Louage), No. 4, 5, 6; Pothier (Louage), No. 153; Dig. lib. 19, tit. 2, lex 15, s. 2.

(t) *Ib.* s. 4; lex 55, s. 1; Instit. lib. 3, tit. 25, s. 3; Cod. lib. 4, tit. 66, lex 1.

(u) Gilbert on Distress; 2 Bro. Abr. Distress, fol. 252; Bradby, 2.

(x) *In prædiis rusticis fructus qui ibi nascuntur tacite intelliguntur pignori esse domino fundi locati, etiamsi nominatim id non convenerit*; Dig. lib. 20, tit. 2, 4, 7, Cod. lib. 8, tit. 15, lex 3, Bract. lib. 2 fol. 62, cap. 28.

(y) Litt. sec. 214.

definite portion of a year, the lessor has no right of entry upon the land nor power to distrain, but must proceed by way of action upon the implied promise of the tenant to pay a fair and reasonable compensation for the permissive use and enjoyment of property (z). By the 34 & 35 Vict. c. 79, the goods of lodgers (a) are protected against distresses for rent due to the superior landlord; and by the 35 & 36 Vict. c. 50, railway rolling stock is protected from distress when on the line.

Extinguishment of the right to distrain by an assignment of the reversion.—If the lessor, after the making of the demise, conveys the property to a purchaser, he has no power to distrain for the rent that became due prior to the execution of the conveyance, as he is no longer possessed of the reversion expectant upon the determination of the lease (b). Neither can the purchaser distrain for such rent; for it was a fruit fallen from the reversion at the time of the conveyance of the demised premises to him (c). If, however, the conveyance was preceded by the ordinary agreement between vendor and purchaser vesting the equitable estate in the latter prior to the rent becoming due, the purchaser would be entitled to recover the rent by action (d).

Apportionment of rent and conditions.—The 4 & 5 Wm. 4, c. 22, respecting the apportionment of rent did not apply to leases created by parol (e). But by the 33 & 34 Vict. c. 35, rents are to be deemed to accrue from day to day, and are apportionable in respect of time. By the Conveyancing and Law of Property Act, 1881, it is provided that, notwithstanding severance of the reversionary estate or the cesser of the term granted by a lease as to part only of the land, every condition contained in the lease shall be apportioned (f).

Of compensation for the use and occupation of land.—The landlord, where there is no agreement for any specific rent, is entitled to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the tenant, without proof of any demise, on the implied promise resulting from the simple fact of the permissive use and enjoyment of the property (g);

(z) *Dunk* v. *Hunter*, 5 B. & Ald. 325.

(a) An under-tenant may be a lodger, *Phillips* v. *Henderson*, 3 C. P. D. 26. What is a lodger is a question of fact: *Ness* v. *Stevenson*, 9 Q. B. D. 245.

(b) Bro. Abr. Dette, pl. 39; *Parmenter* v. *Webber*, 8 Taunt. 593; *Preece* v. *Corrie*, 5 Bing. 24.

(c) *Midgley* v. *Lovelace*, Carth. 289; 12 Mod. 46.

(d) *Anon.*, Skinn. 367; *Midgley* v. *Lovelace*, Carth. 290; as to the mode in which a distress must be levied and other incidents, see *post*, sect. 2.

(e) *Cattley* v. *Arnold*, 28 L. J. Ch. 353; *Plummer* v. *Whiteley*, 29 L. J. Ch. 247.

(f) 44 & 45 Vict. c. 41, s. 12; the section only applies to leases made after Dec. 31, 1881.

(g) 11 Geo. 2, c. 19, s. 14; *Churchward* v. *Ford*, 26 L. J. Ex. 354; 2 H. & N. 446; *Hellier* v. *Sillcox*, 19 L. J. Q. B. 295; *Levy* v. *Lewis*, 6 C. B. N. S. 766; 9 C. B. N. S. 874; 28 L. J. C. P. 304; 30 L. J. C. P. 141; *Hardon* v. *Hesketh*, 4 H. & N. 178.

but no action will lie, unless there is a promise either express or implied to pay for the use and occupation (*h*).

Constructive occupation.—An actual personal occupation is not necessary to entitle the landlord to compensation, when the lessee has entered and taken possession, and the term has become vested in him (*i*). But there must be proof of an actual entry on the land (*k*) and taking of possession, or it must be shown that "there has been an occupation by some other parties standing in such a relation to the defendant that their occupation is his and that he is personally liable for it" (*l*). An entry by one of two joint lessees is an entry by both, so as to render both liable (*m*). The action is maintainable, where no certain rent has been reserved, and where there is, consequently, no right to distrain (*n*). The compensation accrues *de die in diem*, so that if there is no express contract for the payment of rent at specific periods, the lessor is entitled to be paid from day to day so long as the occupation lasts (*o*). Very slight circumstances, such as entry on the lands, the putting up a notice or advertisement, sending a woman to clean windows or rooms, or workmen to put up paper or do repairs, will suffice to establish the fact of entry and of actual occupation (*p*).

An occupation by an under-tenant of the lessee is the lessee's own occupation, as much as if he were himself personally present upon the land. But, if one of two joint lessees holds over after the expiration of his lease, without the assent of his co-lessee, the latter is not responsible in respect of the occupation of such co-lessee (*q*). The occupation of the wife before marriage is not the occupation of the husband (*r*). The actual possession and use by one of two executors of property holden on lease by their testator is not in law a possession and use by both, and does not render both chargeable as joint occupiers in their own right (*s*). If a lessor sells or transfers his legal estate and interest in the demised premises to a third party, and the lessee receives notice of the transfer, and is required to pay his rent to the transferee and refuses, he is liable to an action at the suit of the latter (*t*). The

(*h*) *Turner* v. *Cameron's Coal, &c.*, 5 Exch. 937; *Carmier* v. *Mercer*, cited *Birch* v. *Wright*, 1 T. R. 387; *Mayor of Newport* v. *Saunders*, 3 B. & Ad. 412.

(*i*) *Baker* v. *Holtzapffel*, 4 Taunt. 45; *Izon* v. *Gorton*, 7 Sc. 547; 5 Bing. N. C. 507; *Pollock* v. *Stacy*, 9 Q. B. 1033.

(*k*) *Lowe* v. *Ross*, 5 Exch. 553; 19 L. J. Ex. 318; *How* v. *Kennett*, 3 Ad. & E. 665.

(*l*) *Bull* v. *Sibbs*, 8 T. R. 327.

(*m*) *Glen* v. *Dungey*, 4 Exch. 61; 18 L. J. Ex. 359.

(*n*) *Waring* v. *King*, 8 M. & W. 574; *Hamerton* v. *Stead*, 5 D. & R. 211; 3 B. & C. 482.

(*o*) *Packer* v. *Gibbins*, 1 Q. B. 421.

(*p*) *Sullivan* v. *Jones*, 3 C. & P. 579; *Smith* v. *Twoart*, 2 M. & Gr. 841.

(*q*) *Ibbs* v. *Richardson*, 9 Ad. & E. 849; 1 P. & D. 618; *Christy* v. *Tancred*, 9 M. & W. 438, 448; *Draper* v. *Crofts*, 15 M. & W. 166; 15 L. J. Ex. 92.

(*r*) *Richardson* v. *Hall*, 3 Moore, 307.

(*s*) *Nation* v. *Tozer*, 1 C. M. & R. 175.

(*t*) *Lumley* v. *Hodgson*, 16 East, 104; *Birch* v. *Wright*, 1 T. R. 378; *Rennie* v. *Robinson*, 7 Moore, 22[illegible].

defendant may show that the plaintiff's interest in the premises has expired, or has been transferred to some third party; but he is estopped from denying the lessor's title to grant the property to be enjoyed, and cannot show that the lessor has only the equitable estate, or that he is entitled only as co-executor with others who do not join in the action (*u*). A tenant who has occupied land under a corporation and paid rent to the corporate body, is liable for use and occupation, although the corporation cannot in general contract except by virtue of its common seal (*x*); and a corporation which has actually occupied and used lands, &c., may be made liable during the period of occupation, but not afterwards, unless there is a demise under seal (*y*).

If a man is let into possession under an agreement for a lease to be granted at a future time, and occupies, and receives the profits of, the land, he is liable for a reasonable compensation to be paid to the owner for the use and enjoyment of the property (*z*). But, if he takes possession of property as a purchaser, under a contract of purchase and sale, and the vendor is unable to make out a title, and the bargain, consequently, goes off, the purchaser is not, in general, bound to pay any compensation or remuneration to the owner for the temporary occupation and enjoyment of the property (*a*). If, however, after a contract of purchase and sale has gone off or been abandoned, the intended purchaser continues to occupy and take the rents and profits of the land, by the sufferance and permission of a party who is then entitled to the immediate possession, he is bound to pay a reasonable compensation to such party for the permissive use and occupation of the property (*b*). So, if the vendor of a house continues to reside in it after he has sold it, he is not liable in respect of such subsequent residence, unless it be shown that he was permitted to remain in possession upon the express or implied understanding that the occupation was to be paid for (*c*). If a lessor has agreed to complete a house demised by him, and the tenant enters and occupies, and the landlord neglects to fulfil his agreement, he is nevertheless entitled to recover a reasonable sum in respect of the use and occupation by the tenant of the incomplete house (*d*). If the tenant or occupier has entered as a trespasser and wrongdoer, and has remained in possession and used and occupied the land to

(*u*) *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50.

(*x*) *Mayor of Stafford* v. *Till*, 12 Moore, 260.

(*y*) *Finlay* v. *Bristol & Exeter Ry. Company*, 7 Exch. 417; 21 L. J. Ex. 116, see *ante*, p. 89.

(*z*) *Mayor of Thetford* v. *Tyler*, 8 Q. B. 100

(*a*) *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Winterbottom* v. *Ingham*, 7 Q. B. 611; 14 L. J. Q. B. 298.

(*b*) *Howard* v. *Shaw*, 8 M. & W. 122.

(*c*) *Tew* v. *Jones*, 13 M. & W. 12; see *Met. Ry. Co.* v. *Defries*, 2 Q. B. D. 189, 387, C. A.

(*d*) *Smith* v. *Eldridge*, 23 Law T. R. 270.

the exclusion of the owner, it appears to be somewhat doubtful whether the latter may waive the tort, and consent to the occupation, and sue the tenant upon the ordinary implied promise to pay a reasonable remuneration for the occupation and enjoyment of the property. But, if the owner accepts rent from a trespasser, this is a waiver of the tort and a creation of a tenancy, with its accompanying rights, duties, and responsibilities. If the landlord assigns his interest, and the tenant has notice of the assignment, and continues to occupy with the consent of the assignee, he may be sued by the latter (*e*), but not otherwise (*f*). A lessee is not liable for use and occupation after he has been adjudicated a bankrupt, whether the trustees accept his interest in the premises, or disclaim it (*g*).

Use and occupation by one of several joint-tenants or tenants-in-common.—By the 4 Ann. c. 16. s. 27, it is enacted that actions of account may be maintained by one joint-tenant and tenant-in-common, his executors, &c., against the other as bailiff, for receiving more than comes to his just share or proportion, and against the executor, &c., of such joint-tenant or tenant-in-common. This statute applies to cases where two or more persons are tenants-in-common of land leased to a third party at a rent payable to each, or where there is a rent-charge, or any money payment, or payment in kind, due to them from another person, and one receives the whole, or more than his proportionate share according to his interest in the subject of the tenancy, and not to cases where one has enjoyed more of the benefit of the land, and made more by personal occupation of it, than another. There are many cases in which a tenant-in-common may occupy and enjoy the common land solely, and have all the advantage to be derived from it, and yet not be liable to pay anything to his co-tenant-in-common (*h*).

Covenants and agreements to repair dilapidations.—There is no implied covenant or promise, either on the part of the lessor or the lessee of a house, to repair or uphold it during the term. In Dyer, it is said to be "reasonable law," where a lease of a house has been made without any covenant on either side to repair, "that the termor should require the lessor to do the repairs; and, if the lessor, after notice and request, be negligent, whereby the house falls, the lessee shall have an action upon the case against the lessor for not repairing it, and shall recover as much in damages as the inconvenience he suffers from the want of his house shall amount to" (*i*). But the Court of Queen's Bench has

(*e*) *Standen* v. *Chrismas*, 16 L. J. Q. B. 265; 10 Q. B. 142; 4 Ann. c. 16, s. 9.

(*f*) *Cooke* v. *Moylan*, 1 Exch. 67; *Allcock* v. *Moorhouse*, 9 Q. B. D. 366.

(*g*) Bankruptcy Act, 1869, s. 23.

(*h*) *Henderson* v. *Eason*, 21 L. J. Q. B. 82.

(*i*) Dyer, 36, b.

held that there is no obligation on the part of a landlord to repair in the absence of an express contract in that behalf; and, therefore, if a house demised falls, and destroys the furniture of the lessee, the landlord will not be responsible in damages (*k*). Where the lessor covenants to keep in repair, there is no breach until after notice of want of repair (*l*). But want of notice is no answer to an action for breach of a covenant to put into repair (*m*). Where the landlord covenants to keep in repair he must execute repairs having regard to the class of buildings to which the lease refers, and not merely to condition of the particular building (*n*). Every covenant by a lessee that he will well and sufficiently repair and maintain the demised premises during the term, and deliver them up at the expiration thereof in good repair and condition, will be construed in connection with surrounding circumstances; and the extent of the liability will depend upon the age of the buildings, the state and condition of them at the time of the demise, and the length of the lease. If the house is an old house, the tenant is bound to keep it up only as an old house, and cannot be compelled to re-place old materials with new (*o*). "Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about, in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised. If it appears that he has made these applications, and laid out money from time to time upon the premises, it would not be fair to judge him very rigorously by the reports of a surveyor, who is generally sent in for the very purpose of finding fault. The jury are to say whether or not the lessee has done what was reasonably to be expected of him, looking to the age of the premises on the one hand, and to the words of the covenant which he has chosen to enter into on the other" (*p*). If the lessee

(*k*) *Gott* v. *Gandy*, 2 E. & B. 845; 23 L. J. Q. B. 1.

(*l*) *Makin* v. *Watkinson*, L. R. 6 Ex. 25; 40 L. J. Ex. 33; *London & S. W. Ry.* v. *Flowers*, 1 C. P. D. 77; *Manchester Warehouse Co.* v. *Carr*, 5 C. P. D. 507.

(*m*) *Covard* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1.

(*n*) *Saner* v. *Bilton*, 7 Ch. D. 815; such a covenant implies a licence from the tenant to enter to do the repairs, *Saner* v. *Bilton*, *supra*.

(*o*) *Harris* v. *Jones*, 1 Mood. & Rob. 175.

(*p*) Tindal, C. J., *Gutteridge* v. *Munyard*, 1 Mood. & Rob. 336.

has covenanted to keep the demised premises in good repair during the term, and at the time of the demise they were old and in bad repair, he must put them in good repair as old premises, and not keep them in bad repair because they happened to be in that state when he took them. The age and class of the premises, however, with their general condition as to repair, must be looked at in order to measure the extent of the repairs to be done (*q*). If the lessee has covenanted to repair buildings, "the same being first put into repair by the lessor," the liability of the lessee does not arise until after all the buildings have been put into repair by the lessor (*r*), who is bound to repair in the first instance (*s*). When the lessee has entered into an express covenant or agreement to repair, uphold, and keep in repair a house, or any other structure or building demised to him, he is bound to re-build or re-construct it, if it is burned by an accidental fire, or blown down by tempest, or destroyed by floods or by an inevitable accident; for, "when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." And, therefore, if the lessee covenants to repair a house, or a bridge, and the house is burned down by lightning or an accidental fire, or thrown down by enemies, or the bridge is washed away, the lessee must re-build (*t*). The ordinary covenant to repair the demised tenements and dwelling-houses does not extend (so as to create a forfeiture under a proviso for re-entry in case of non-performance of covenant) to an entirely new structure erected during the term, not in existence and not forming part of any buildings on the premises at the time of the execution of the lease (*u*), unless it appears that the land was demised for building purposes, and that the erection of buildings by the lessee during the term was contemplated by the parties, and that the covenant was meant to extend to buildings thereafter to be erected (*x*).

Where a lease, executed on the 9th of November, contained a covenant on the part of the lessee to repair, and the tenant had taken possession and pulled down buildings in the preceding month of June, it was held that he could not be made responsible in an action of covenant, as the lease was not then executed,

(*q*) *Payne* v. *Haine*, 16 M. & W. 545; 16 L. J. Ex. 130.

(*r*) *Neale* v. *Ratcliff*, 15 Q. B. 916; 20 L. J. Q. B. 130; *Coward* v. *Gregory*, 36 L. J. C. P. 1; L. R. 2 C. P. 153.

(*s*) *Cannock* v. *Jones*, 3 Exch. 233

(*t*) 40 Ed. 3, fol. 6, pl. 11; *Paradine* v. *Jane*, Aleyn. 27; 2 Saund. 421 a (2); Dyer, 33 a, pl. 10; *Brecknock Company* v *Pritchard*, 6 T. R. 750; *Bullock* v. *Dommitt*, *ib.* 650; *Chesterfield* v. *Bolton*, 2 Com Rep. 627.

(*u*) *Cornish* v. *Cleife*, 3 H. & C. 446; 34 L. J. Ex. 19.

(*x*) *Dowse* v. *Cale*, 2 Vent. 136; 3 Lev 264.

although the *habendum* of the lease stated that the premises were to be holden from the preceding 22nd of June. The *habendum* marked only the duration of the tenant's interest, and could not operate retrospectively as a grant (*y*). If the lease is under seal, and the tenant has bound himself by covenant to repair, and the landlord assigns his interest, the assignee is entitled, as we shall see (*post*, p. 1273), to sue upon the covenant (*z*). A covenant to put into repair is not a continuing covenant (*a*); but covenants to keep in repair are covenants which run with the land, and are continuing covenants to the end of the term (*b*). And the recovery of damages for a breach of them is no bar to an action for a subsequent breach, but only matter in mitigation of damages (*c*). They extend to all additions and enlargements of structures existing at the time of the demise, but not to detached, independent buildings erected after the making of the lease (*d*). If the landlord has evicted the tenant from part of the demised premises, the tenancy is not, as we have seen, thereby determined, and the tenant is not discharged from the performance of a covenant to repair (*e*). The landlord is entitled to recover damages for breach of a contract to yield up in repair at the end of the term, although he immediately proceeds to demolish the buildings (*f*).

Where a party entered into possession under a lease, which was void as to the duration of the term from its being an invalid execution of a power, but the lessee had the benefit of the possession of the land and the perception of the profits for the whole term purported to be granted, he was held liable upon his covenant to repair contained in the same lease (*g*). And, where articles of agreement under seal were entered into between an intended lessor and lessee for the grant of a lease for twenty-one years, as soon as a licence from the lord of the manor (the land being copyhold land) could be obtained, and the lessee covenanted to keep the premises in repair during the term so to be granted, and subsequently entered and took possession of the land, and occupied the same under the agreement for the full term of twenty-one years, it was held that he was responsible upon his covenant to repair, although the intended lease had never been made, nor any licence obtained from the lord (*h*). If the lessee has not entered and held under the indenture of demise executed by him, and

(*y*) *Shaw* v. *Kay*, 1 Exch. 412; 17 L. J. Ex. 17.

(*z*) *Bickford* v. *Parsons*, 17 L. J. C. P. 192.

(*a*) *Coward* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1.

(*b*) *Martin* v. *Clue*, 22 L. J. Q. B. 147.

(*c*) *Coward* v. *Gregory*, L. R. 2 C. P. 153; 36 L. J. C. P. 1.

(*d*) *Cornish* v. *Cleife*, 34 L. J. Ex. 19; 3 H. & C. 446.

(*e*) *Morrison* v. *Chadwick*, *ante*, pp. 229, 230.

(*f*) *Rawlings* v. *Morgan*, 18 C. B. N. S. 776; 34 L. J. C. P. 185.

(*g*) *Beale* v. *Sanders*, 3 Bing. N. C. 850; 5 Sc. 58.

(*h*) *Pistor* v. *Cater*, 9 M. & W. 315.

upon the terms of the covenant he has thought fit to enter into, but under a distinct parol demise, then he is not liable upon the covenants of the lease (*i*). Where a lease made under a leasing power was void from non-compliance with the requirements of the power, but the lessee entered and took possession, and paid rent, and then assigned his interest, and the assignee entered and paid rent under the void lease, and continued in possession until the end of the term intended to have been granted, it was held that he must be taken to have promised to hold upon the terms of the lease, and that he was liable for not repairing according to the covenant therein contained (*k*). We have already seen (*ante*, p. 212) that, if a party assents verbally to certain printed terms of hiring, and enters and takes possession, he will be bound by the printed terms, although they are not signed either by him or by the lessor (*l*). Where a tenant gave a written undertaking to hire a house for three years, and to pay rent and repair during the term, but there was no lease or agreement on the part of the lessor, and the tenant entered and took possession and held the premises for more than three years, it was held that he was responsible for neglecting to repair according to his undertaking (*m*).

The owner of two houses 38 and 40 demised 38 by lease containing a covenant by the lessee to repair walls and party walls. Afterwards he demised 40 similarly. No. 40 was built so as to extend over a gateway between it and 38, and it rested on the wall which was a party-wall between 38 and the gateway, but this wall did not belong to 40. In an action by the lessee of 40 against the owner it was held that there was no implied covenant on his part to repair this party-wall (*n*). It was said that if an action were brought by the owner against the lessee of 40 it might be an answer to say that the owner had neglected some precedent obligation, because 40 could not be repaired without first repairing this party-wall; but the suggestion is not very clear (*o*).

By the statute of Anne, as we have seen (*ante*, p. 230), the assignee of the reversion cannot sue for the rent without having given notice of the assignment, but there is no provision to that effect with respect to his right to sue or eject for a forfeiture for non-repair, for the tenant may not know to whom to pay the rent without notice, but he must know that he ought to repair (*p*).

Of the tenant's liability for injury or damage done to the

(*i*) *Pitman* v. *Woodbury*, 3 Exch. 12.
(*k*) *Beale* v. *Sanders*, 5 Sc. 58; 3 Bing. N. C. 859; *Lee* v. *Smith*, 23 L. J. Ex. 199.
(*l*) *Lord Bolton* v. *Tomlin*, 5 Ad. & E. 856.
(*m*) *Richardson* v. *Gifford*, 1 Ad. & E. 55.
(*n*) *Colbeck* v. *Girdlers Co.* 1 Q. B. D. 234.
(*o*) *Colbeck* v. *Girdlers Co.*, *supra*.
(*p*) *Scaltock* v. *Harston*, 1 C. P. D. 106.

demised premises.—In the absence of an express covenant or agreement to repair, there results from the demise and acceptance of the lease by the lessee an implied covenant or promise, according as the lease is by deed or by simple contract, to use the property demised in a tenant-like and proper manner, to take reasonable care of it, and restore it, at the expiration of the term for which it is hired, in the same state and condition as it was in when demised, subject only to the deterioration produced by ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required. The extent of the liability of the tenant for the preservation of the property depends upon the duration and value of his own term and interest therein. A tenant for life, for example, is bound to watch over the interests of the reversioner, and is responsible for permissive as well as commissive waste, whilst a tenant at will, or from year to year, is responsible only for commissive waste (*q*).

Permissive waste by lessees for terms of years.—A tenant for term of years is responsible for permissive as well as commissive waste (*r*), but where he has not obliged himself by covenant to do repairs, he is not bound to rebuild; for if the subject of occupation perishes from time and natural decay, the landlord is the person to provide a new one, if he think fit (*s*). A tenant for years must not suffer the roof of a house to remain uncovered, so as to let the timbers rot, and must use all reasonable endeavours to keep the buildings wind and water-tight; but he is not bound to repair the principal timbers of the roof, nor to replace old materials with new, except where the expense is of a trifling character, and the mischief, if neglected and left unrepaired, would operate to the lasting injury of the inheritance. If a roof is blown off by tempest, he is not bound to put on a new roof, but if a few tiles only are stripped off, he is bound to replace them, or adopt means to keep out the wet (*t*). The extent of the liability of a lessee, not holding under a covenant or agreement to repair, for permitting buildings demised to him to go to decay and ruin, will depend upon the age and general state and condition of the buildings at the time he took possession of them, the nature and extent of the repairs required for their preservation, and the duration of his own term and interest in the property (*u*); for a tenant-at-will, or tenant from year to year, cannot be expected to do as much for the

(*q*) *Harnett* v. *Maitland*, 16 M. & W. 256; *Herne* v. *Bembow*, 4 Taunt. 764; *Jones* v. *Hill*, 7 Taunt. 392; 1 Moore, 100; *Torriano* v. *Young*, 6 C. & P. 12.

(*r*) *Yellowly* v. *Gower*, 11 Exch. 294; 24 Law J. Exch. 299.

(*s*) Bayley, J., *Wise* v. *Metcalfe*, 10 B. & C. 314.

(*t*) See *Lady Shrewsbury's case*, 5 Co. 13, b.; *M'Kenzie* v. *McLeod*, 4 M. & Sc. 253; 10 Bing. 385; *Salop* v. *Crompton*, Cro. Eliz. 777.

(*u*) *Ferguson* v. ——, 2 Esp. 590; *Anworth* v. *Johnson*, 5 C. & P. 239.

preservation of the property as a tenant for a long term of years. If a house is burnt by negligence, this, as we shall presently see, is waste; and if sea-walls and river-banks are destroyed from want of timely reparation, this will be waste; but if they receive the usual and customary repairs, and are destroyed by a great tempest or a violent inundation, the lessee is not responsible for waste if he fails to rebuild them (*x*). So where a building is destroyed by what is under all the circumstances an apparently reasonable user of the building the tenant is not liable for "waste" (*y*).

Commissive waste by tenants for terms of years.—Whenever a tenant or lessee makes material changes in the nature of the premises demised to him, which have the effect of converting them into something substantially different from what they were at the time they were placed in his hands, he is guilty of commissive waste, and is responsible in damages for infringing upon the proprietary rights of the landlord. The tenant by the lease has the use, not the dominion, of the property demised to him, and cannot make permanent changes and alterations in the property without the consent of the landlord, although such changes and alterations may greatly enhance the value of it; for the owner has a right to have his houses and lands kept in an unaltered state, surrounded by all their old features, landmarks, and associations (*z*). Therefore an action is maintainable by the reversioner pending the term against the tenant for inclosing and cultivating waste land included in the demise, and for continuing the grievance (*a*); also for the pulling down of an old building, and the substitution in lieu thereof of tenements of greater value (*b*), for stopping up the windows (*c*), or for removing a partition-wall in a house and enlarging a chamber (*d*).

Where a lessee opened a new door in a house, whereby the house was not in any respect weakened or injured, it was held to be a question for the jury whether there was or was not any injury to the rights of the reversioner (*e*). But, if there is any substantial alteration in the form and arrangement of the house, the house is no longer the same house, and there is an invasion of the proprietary rights of the landlord or reversioner. It is no answer to an action for the infringement of these rights to say that the defendant might, before the expiration of the lease, restore the premises to their former plight, and surrender them up to the landlord in their original condition (*f*).

(*x*) 2 Roll. Abr. WASTE (C.)

(*y*) *Manchester Warehouse Co.* v. *Carr*, 5 C. P. D. 507, following *Saner* v. *Bilton*, 7 Ch. D. 815.

(*z*) *Smyth* v. *Carter*, 18 Beav. 78.

(*a*) *Provost, &c., of Queen's College* v. *Hallett*, 14 East, 489.

(*b*) *Cole* v. *Green*, 1 Lev. 309.

(*c*) *Thomlinson* v. *Brown*, Sayer, 215.

(*d*) 2 Roll. Abr. 815, pl. 9.

(*e*) *Young* v. *Spencer*, 10 B. & C. 145.

(*f*) *Provost, &c., of Queen's College* v. *Hallett*, 14 East, 489; *Cole* v. *Forth*, *infra*.

The lessee of a water-mill, worked by a head of water penned back under a prescriptive right to pen back water for the purpose of working the mill, has no right to alter the height of the tumbling-bay, or transpose or alter the old permanent water-marks, as it tends to destroy the landlord's evidence of title to the head of water, and goes to the destruction of the thing granted. The lessee of house property must not remove wainscots or floors, or pull down and rebuild, or open new windows and doors, and change the form and arrangement of the house, without the consent of the owner. He cannot convert one species of edifice into another, such as a corn-mill into a fulling-mill, or malt-mill, or a water-mill into a wind-mill, though the conversion be to the pecuniary advantage of the landlord, as well as to the benefit of the tenant (*g*). He must not fell timber-trees (except for the necessary repairs of a house he has covenanted to repair), nor destroy spring-woods or young plants destined to become trees; but he may cut willows, maples, beeches, and thorns, if they do not shelter a dwelling-house or sustain a bank, or afford shelter to cattle, and the cutting of them is not prejudicial to the inheritance. He may also cut oaks and ashes where they are usually cut as underwood, and are in due course to grow up again from the stumps, and the cutting is warranted by local custom and usage. He must not dig for gravel, lime, clay, brick-earth, stone, or the like, except for the necessary repair and improvement of the demised premises, in fulfilment of the covenants of his lease. He must not remove virgin soil (*h*), nor open quarries or mines of metal or coal, for the purpose of selling the produce thereof; but he may work mines and quarries which were open and in existence at the time of the demise, as they then form part of the annual profits of the land. He must not convert arable land into pasture, or pasture into arable land, or plough up a warren, or stub up a wood to make it pasture, or divert the courses of streams, nor dry up ancient pools or fish-ponds, nor destroy fences, nor put land under water, nor destroy the stock or breed of anything. He must not take all the fish out of a fish-pond, or the doves from a dovecote, or the deer from a park, or the rabbits and conies from a warren, or the game from preserves; but he is entitled to the reasonable use and enjoyment of them, leaving as many in store for the landlord when he goes out as he found when he was intrusted with the possession and use of the property (*i*).

(*g*) Bac. Abr. (WASTE); *Cole* v. *Forth*, 1 Mod. 94; Co. Litt. 53, a., 53, b.

(*h*) *Higgon* v. *Mortimer*, 6 C. & P. 616.

(*i*) *D'Arcy* (*Ld.*) v. *Askwith*, Hob. 234; *Phillips* v. *Smith*, 14 M. & W. 593; Bac. Abr. (WASTE), Litt. S. 71.

Waste may be committed by removing glass annexed to windows, for it is parcel of the house; and although the lessee himself, at his own cost, put the glass in the windows, yet, being once parcel of the house, he cannot take it away or waste it. Wainscot also, whether annexed to the house by the lessor or the lessee, is parcel of the house, and cannot be removed, unless it is purely of an ornamental character (*post*, p. 250); and there is no difference in law if it be fastened by great nails, or little nails, or by screws or irons put through the posts or walls (*k*), for every chattel affixed to the soil of another becomes a part of the soil, and belongs to the owner of the land, unless it is shown to have been affixed there in the necessary enjoyment of an easement by the person entitled to the easement, in which case it will belong to the latter, and not to the owner of the soil (*l*).

Waste by tenant from year to year.—Tenant from year to year is not responsible for permissive waste. Where an action on the case was brought by a lessor against a lessee holding from year to year, for suffering a house demised to him to go to ruin for want of repairs to the roof and windows, it was held that such an action was not maintainable. "There is no doubt," observes Mansfield, C.J., "but that an action on the case may be maintained for wilful waste; but, at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable against a tenant from year to year, such an action might be brought against a tenant-at-will who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it" (*m*). But every tenant from year to year is bound to take all due and reasonable care of the premises demised to him, and if windows are broken by the wind or hail, and the rain gets in, he is liable for the non-repair of them, if the consequences of his neglect would be damage to the building from the rain.

A mere tenant at will, whose interest the Roman lawyers called "*precarium*," or a mere tenant from year to year, is not bound, unless by special contract, to expend money in repairs and improvements. "The farmer," observes Domat, "ought to use the lands he has in farm as any prudent and discreet man would use his own, and to keep them, preserve them, and cultivate them at the proper seasons, in the manner agreed on by the lease, or regulated by custom. He cannot increase his profits out of the lands to the prejudice of the proprietor. He cannot sow arable lands when

(*k*) *Herlakenden's case*, 4 Co. 63, b.; *Wilde* v. *Waters*, 16 C. B. 637.

(*l*) *Lancaster* v. *Eve*, 5 C. B. N. S. 717.

(*m*) *Gibson* v. *Wells*, 1 B. & P. N. R. 290; *Herne* v. *Benbow*, 4 Taunt. 764; *Martin* v. *Gilham*, 7 Ad. & E. 543.

they ought to lie fallow, nor sow wheat when he ought only to sow barley or oats, if these changes would make the lands to be in a worse condition at the end of the lease than they ought to be" (n).

The lessee of land who erects a building thereon does not commit waste by so doing, unless it can be shown that such building is an injury to the inheritance (o).

Timber trees.—Wherever trees are excepted from a demise, there is, by implication, a right in the landlord to enter on the land and cut the trees at all reasonable times (p).

Of the duty of the tenant to preserve the landlord's landmarks and boundaries.—Where a tenant for life, or for years, or at will, has land of his own adjoining to that which he holds as tenant, it is his duty to keep the boundaries between the two properties clear and distinct, so that, at the expiration of the tenancy, the reversioner or remainderman may be able without difficulty to resume the possession of what belongs to him; and, if the tenant or lessee neglects this duty, and suffers the boundaries to be confused, so that the reversioner or remainderman cannot tell to what land he is entitled, the courts will give relief by compelling the person who has occasioned the difficulty to remove it, and restore the proper boundaries, if it can be done, or, if not, to give an equivalent. This relief is given, not only against the party guilty of the neglect, but also against all those who claim under him, either as volunteers or purchasers without notice (q).

Fences.—There is no implied agreement on the part of a lessor to keep up the fences of closes which he retains in his own hands, and which abut on land demised to a tenant, so as to prevent the tenant's cattle from straying on to them (r).

Restrictive covenants as to the user of premises entered into between lessor and lessee run with the land (*post*, p. 1275). A general covenant by the lessee that he will not do, or suffer to be done, upon the demised premises anything which may become an annoyance to the tenants of the adjoining houses may prevent him from opening a shop or coal-office, or carrying on any trade or business in a dwelling-house (s).

A lessee covenanted not to do anything to annoy or diminish the value of the property adjoining, or build without the approval of the lessor, &c. The owner afterwards leased the adjoining property to another who made a similar covenant. The first lessee began to build with the approval of the lessor. It was held that

(n) Domat, l. 1, tit. 4, s. 2.

(o) *Jones* v. *Chappell*, L. R. 20 Eq. 539.

(p) *Hewitt* v. *Isham*, 7 Exch. 79.

(q) *Attorney-General* v. *Stephens*, 6 De G. M. & G. 111; 25 L. J. Ch. 888.

(r) *Erskine* v. *Adeane*, L. R. 8 Ch. 756; 42 L. J. Ch. 835.

(s) *Wilkinson* v. *Rogers*, 10 Jur. N. S. 5.

the second lessee could not call upon the owner to restrain the first from building (t). Where a building has been erected without complaint, the Court will not grant a mandatory injunction to pull it down (u). Where a lessor covenanted that he would not let any other house in the same street "for the purpose of an eating house," and then let a house to a person who set up an eating house although covenanting not to do so, it was held that the lessor was not liable to the first lessee (x).

Where the lessee covenanted not to carry on any "business &c., whatsoever, or anything of the nature thereof, or to suffer anything which may grow to the annoyance, &c., of the neighbourhood," he was prohibited from using the premises as a throat hospital, where small payments were made by the patients (y). Where there was a covenant to pay an extra rent in case any noxious trade was carried on, it was held that this was not a licence to carry on the trade paying the rent, but was a covenant rendering void the lease at the option of the lessor (yy).

The right to remove fixtures, without incurring liability for waste, is considered at length in many learned treatises (z), but the present chapter will be confined to the consideration of fixtures that have been held removable, or irremovable, as between landlord and tenant.

Landlord's fixtures.—The term "landlord's fixtures" means such things as the landlord chooses to annex to the freehold and demise with it, and which, of course, the tenant has no right to remove, and must restore at the end of the term: such as grates, marble chimney-pieces, locks, keys, bars and bolts, steam-engines and boilers, hay-cutters, malt-mills, corn-crushers, grinding-stones, &c. (a).

Tenant's fixtures.—The rule formerly was, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards took it away, it was waste. In the progress of time this rule was relaxed, and many exceptions have been grafted upon it One has been in favour of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed only by screws, and the like (aa). Of all these, it is to be observed that they are exceptions only (b). Other exceptions have been grafted upon the rule in favour of the enjoyment of the occupation, and in favour of trade,

(t) *Master* v. *Hansard*, 4 Ch. D. 718; *Renals* v. *Cowlishaw*, 11 Ch. D. 866. See however *Nicoll* v. *Fenning*, 19 Ch. D. 258.

(u) *Gaskin* v. *Balls*, 13 Ch. D. 324, C. A.

(x) *Kemp* v. *Bird*, 5 Ch. D. 974, C. A.

(y) *Bramwell* v. *Lacy*, 10 Ch. D. 691; see also *Garman* v. *Chapman*, 7 Ch. D. 271.

(yy) *Weston* v. *Met. Ass. District*, 9 Q. B. D. 404.

(z) Amos on Fixtures; Grady on Fixtures; and see *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. Ca. 382.

(a) *Walmsley* v. *Milne*, 7 C. B. N. S. 115; 29 Law J. C. P. 97.

(aa) See the cases collected in Smith & Soden's L. & T., 2nd ed., p. 244.

(b) *Buckland* v. *Butterfield*, 4 Moore, 447.

and vessels, machinery, and utensils, which are immediately subservient to the purposes of trade (*bb*). If a landlord lets a house unfurnished, without the conveniences of grates or gas-fittings, and the tenant, for the enjoyment of his occupation, fixes them in the house, he may, unless he has contracted to leave them behind, remove them during his term. Whether a particular fixed chattel belongs to the landlord or the tenant, must in some instances depend upon what the contracting parties propose to be the subject of the demise (*c*). Pillars of brick and mortar built on the floor of a dairy by a tenant to sustain milk-pans have, however, been held to be part of the freehold (*d*), also barns and beast-houses, waggon-houses, fuel-houses, pigeon-houses, carpenters' shops for mending waggons and carts, and agricultural buildings employed and used upon the farm, and let into the ground, and not merely placed on the surface thereof, or on a brick or stone floor (*e*); also railway-sleepers (*ee*); also conservatories, hot-houses, or green-houses, erected on a brick or stone foundation, and attached thereto by permanent fastenings; so that if the tenant removes them after he has put them up he is guilty of waste (*f*). But if the tenant raises and constructs foundations of a permanent character for the reception of a superstructure of wood, and the superstructure merely rests on this foundation, or is attached thereto by screws or movable pins or bolts, so as to be removable at pleasure without material or permanent injury to the freehold, the movable structure placed on such foundation by the tenant continues the property of the latter, and may be carried away by him at the expiration of his lease (*g*). A door which may be lifted from its hinges, and a sliding fender used to prevent the escape of water from a mill-stream, does not necessarily become part of the freehold (*h*); nor a mooring-pile, driven into land for the accommodation of the navigation of a canal or river (*i*); nor looms of a worsted mill fixed by nails (*ii*). But locks, keys, and bars belong to the landlord; and so does a shutter and sliding bolt, put up for the security of the premises.

(*bb*) See the cases collected in Smith & Soden's L. & T., 2nd ed., p. 240.

(*c*) *Elliott* v. *Bishop*, 10 Exch. 496; 11 *ib.* 113, *Sumner* v. *Bromilow*, 34 L. J. Q. B. 130.

(*d*) *Leach* v. *Thomas*, 7 C. & P. 327.

(*e*) *Elwes* v. *Maw*, 3 East, 38; 2 Smith's L. C. 153, 6th edit.; *Wood* v. *Hewett*, 8 Q. B. 913.

(*ee*) *Turner* v. *Cameron*, L. R. 5 Q. B. 306.

(*f*) *Buckland* v. *Butterfield*, 4 Moore, 440; 2 B. & B. 54; *Jenkins* v. *Gething*, 2 Johns & H. 520; *Syme* v. *Harvey*, 24 Sc. Sess. Cas. 502; *Sleddon* v. *Cruikshank*, 16 M. & W. 71; 16 Law J. Exch. 61.

(*g*) *Grymes* v. *Boweren*, 4 M. & P. 143, 6 Bing. 437; *Rex* v. *Otley*, 1 B. & Ad. 161; *Wansbrough* v. *Maton*, 4 Ad. & E. 884; *Davis* v. *Jones*, 2 B. & Ald. 165; *Rex* v. *Londonthorpe*, 6 T. R. 377; *Wiltshear* v. *Cottrell*, 22 Law J. Q. B. 181.

(*h*) *Wood* v. *Hewitt*, 15 Law J. Q. B. 247.

(*i*) *Lancaster* v. *Eve*, 5 C. B. N. S. 726.

(*ii*) *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Ex parte Astbury*, L. R. 4 Ch. 630; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

Agricultural tenant's fixtures made removable by statute.—By 14 & 15 Vict. c. 25, s. 3, it is enacted that if any tenant shall with the consent in writing of the landlord, at his own cost and expense, erect any building, engine, or machinery, for the purposes of trade or agriculture, such buildings shall be the property of the tenant, and shall be removable by him, one month's previous notice in writing being given of his intention, and the landlord or his agent being afforded an opportunity of purchasing the thing proposed to be removed, as therein mentioned.

If a tenant receives from his landlord timber for the purpose of erecting a shed, and uses the timber in the construction of it, he has no right to pull down the building and remove the timber, although he has added materials of his own, and confounded them, in the erection, with those furnished by the landlord (*k*).

By the Agricultural Holdings Act, 1875 (*kk*), it is enacted that where after the commencement of this Act a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf, or instead of some fixture belonging to the landlord, then such fixture shall be the property of, and be removable by, the tenant.

Provided as follows :—

1. Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding.
2. In the removal of any fixture the tenant shall not do any avoidable damage to any building or other part of the holding.
3. Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any building or other part of the holding by the removal.
4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it.
5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding ; and any difference as

(*k*) *Smith* v. *Render*, 27 Law J. Exch. 83.

(*kk*) 38 & 39 Vict. c. 92, s. 53.

to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal):

But nothing in this section shall apply to a steam-engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof (*l*).

Ornamental fixtures.—The ornamental fixtures now held severable and removable by the tenant are, chimney-glasses, pier-glasses, ornamental chimney-pieces, and stoves, tapestry and hangings nailed to the wall, in lieu of ornamental paper or panels (*ll*), and ornamental cornices capable of being detached without injury to the building (*m*).

Domestic and trade fixtures.—Amongst the various domestic and trade-fixtures held to be removable by the tenant are gas-pipes and gas-fittings, and water-pipes attached to buildings by metal bands and nails, grates, ranges, ovens, coppers, bells, blinds, fixed tables, water-butts, cupboards, &c. (*n*), soap-boilers' furnaces, fat-vats, coppers, dyeing and brewing vessels, cider-mills, baking-ovens, steam-engines, and salt-pans (*o*); also machinery, engines, vats, plant and utensils used in trade, however bulky or complex they may be in their construction. The tenant may take them to pieces, and remove them, and put them together again in the same form in some other place. And where a shed or building is a mere accessory to a trade fixture, such as a shed, or any temporary building, erected merely for the purpose of covering and protecting a steam engine, or machinery or trade utensils, from the effect of the weather, it may be removable, together with the trade-fixture to which it belonged, on the ground that "omne accessorium sequitur suum principale." But a building is not removable merely because it has been erected for manufacturing or trading purposes, or for the purpose of covering and protecting machinery. If the building is of a substantial character, standing on brick or stone foundations let into the soil, and is constructed so as not to be removable without the entire destruction of the fabric, it cannot be disannexed from the freehold and taken away, although it may be built over a steam-engine, and may contain nothing but steam-machinery, spinning-jennies, drums and wheels, all of which may be removable, and to all of which it may in a certain sense be accessory (*p*).

(*l*) It should be remembered that this Act is greatly limited in its application: see sects. 54—60.

(*ll*) *Beck* v. *Rebow*, 1 P. Wms. 94.

(*m*) *Avery* v. *Cheslyn*, 3 Ad. & E. 75.

(*n*) *Wall* v. *Hinds*, 4 Gray's Amer. Rep. 272; *Elliott* v. *Bishop*, *ante*, p. 248.

(*o*) 42 Ed. 3, fol. 6, pl. 19; 20 Hen. 7, fol. 13, pl. 24; *Poole's case*, 1 Salk. 368; *Lawton* v. *Lawton*, 3 Atk. 13; *Penton* v. *Robart*, 2 East, 90.

(*p*) *Whitehead* v. *Bennett*, 27 Law J. Ch. 474.

Fixtures removable by local custom and usage.—Things annexed to the freehold are sometimes held removable in accordance with local custom and usage in particular districts, such as barns and granaries erected on stone pillars, or on pattens, or blocks of timber (*q*). And if the pillars or pattens merely rest on the ground, and are not attached to foundations sinking into the soil, they are removable without any custom (*r*).

Abandonment of the right to disannex and remove ornamental and trade fixtures.—If the tenant has entered into an express covenant to yield up, at the expiration of his term, "all erections and buildings that may be erected," or "all improvements that may be made," upon the demised premises, he cannot afterwards remove trade erections, or buildings, or trade or ornamental or domestic fixtures (*s*). A covenant in a lease to yield up the demised premises to the lessor at the expiration of the lease, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease, and does not extend to fixtures which were not then in existence; but a covenant to yield up fixtures belonging, or that may belong, to the demised premises, extends to fixtures that are afterwards put up by the tenant (*t*).

Inability of the tenant to remove fixtures after the expiration of his term.—Whenever an outgoing tenant is possessed of fixtures which he has a right to remove, he must exercise such right prior to the determination of his tenancy; he cannot, after a formal disclaimer of the title of his landlord, or after he has once quitted the demised premises and given up the key to the landlord, re-enter for the purpose of severing and removing fixtures. "After the term, they become a gift in law to him in reversion, and are not removable," unless the tenant, after the expiration of the term, has remained in possession, with the sufferance and permission of the landlord, and actually severs them and removes them during the continuance of his lawful possession, after the expiration of the term. If he holds over wrongfully, he loses his right to sever and remove his fixtures; and if he quits possession, and the tenancy is determined, his right to his fixtures is extinguished, and they become the property of the reversioner (*u*). If the lease becomes

(*q*) 11 Vin. Abr. 154; EXECUTORS, U. pl. 74; *Culling* v. *Tuffnell*, Bull. N. P. 34.

(*r*) 2 Smith's L. C. 6th ed.; notes to *Elwes* v. *Maw*.

(*s*) *Naylor* v. *Collinge*, 1 Taunt. 19; *Thresher* v. *E. L. Water Co.*, 2 B. & C. 608; 4 D. & R. 62; *Martyr* v. *Bradley*, 2 M. & Sc. 25; 9 Bing. 24; *West* v. *Blakeway*, 3 Sc. N. R. 218: *Elliott* v. *Bishop*, *ante*, p. 243; see also *Dumergue* v. *Rumsey*, 33 L. J. Ex. 88; *Sumner* v. *Bromilow*, 34 *ib.* Q. B. 130.

(*t*) *Hitchman* v. *Walton*, 4 M. & W. 414; *Metrop. Co. Ins. Soc.* v. *Brown*, 28 Law J. Ch. 581.

(*u*) *Leader* v. *Homewood*, 5 C. B. N. S. 546; 27 Law J. C. P. 316; *Ruffey* v. *Henderson*, 21 *ib.* Q. B. 49; 17 Q. B. 574; *Heap* v. *Barton*, 12 C. B. 274.

forfeited, and the tenant, whilst he continues in possession after the forfeiture, and before judgment in ejectment has been obtained against him, removes his fixtures, he will be entitled to retain those removed within a reasonable time, as they are not forfeited to the landlord by the forfeiture of the lease (*x*). But if the landlord re-enters for the forfeiture the tenant's right to remove the fixtures is gone (*y*).

Right of purchasers, or mortgagees, to enter and remove fixtures.—The right of the assignee of the lessee can of course, in general, extend no further than the right of the lessee himself; but the tenant's right to remove fixtures is held to be so far connected with the land, that it may be considered as a right or interest in it, which, if the tenant grants away, he shall not be allowed to defeat his grant by a subsequent voluntary act of surrender, "for, as regards strangers who were not parties or privies to the surrender, the estate surrendered hath in law a continuance" (*z*); and, therefore, if a lessee who has mortgaged his fixtures surrenders his term and quits possession, the mortgagee may nevertheless enter and remove the fixtures (*a*). Trade fixtures affixed to mortgaged premises by the mortgagor in a quasi-permanent manner, before or even after the mortgage, pass to the mortgagee (*b*). An equitable mortgagee has the same rights in this respect as a legal mortgagee (*c*).

Waste committed by strangers upon land demised to a tenant or lessee.—Every lessee of land, whether for life or years, is liable, under the statute of Gloucester, to an action for commissive or wilful waste done on the land in lease, by whomsoever it may be committed. The statute of Gloucester "prohibiteth farmers from doing waste; and yet, if they suffer a stranger to do waste, they shall be charged with it, for it is presumed in law that the farmer may withstand it, 'Et qui non obstat quod obstare potest, facere videtur.' In this case the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste, and so the loss, as reason requireth, in the end shall lie upon the wrong-doer" (*d*).

Licence to commit waste.—If a general or partial permission be given to the lessee by the lease to commit waste, he is so far tenant

(*x*) *Stansfeld* v. *Mayor of Portsmouth*, 4 C. B. N. S. 131; *Summers* v *Bromilow*, 34 L. J. Q B. 130; but see *Stoner* v *Hunter*, 3 B. & C. 368

(*y*) *Pugh* v. *Acton*, 38 L. J Ch 619, L. R. 8 Eq. Ca. 626.

(*z*) Co. Litt. 338b.

(*a*) *Lond. & Westminster Loan, &c Co.*, 6 C. B. N. S. 798; 28 Law J. C P 297.

(*b*) *Cullwick* v. *Swindell*, L. R. 3 Eq. Ca. 249; *Climie* v. *Wood*, L. R. 3 Exch. 257; 4 Exch. 328 (Exch. Ch.); 38 L. J. Exch. 223; see *Boyd* v. *Shorrock*, L. R. 5 Eq. Ca. 72; *Ex parte Ashbury*, L. R. 4 Ch. App. 630; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Holland* v. *Hodgson*, L. R. 7 C. P. 328.

(*c*) *Tebb* v. *Hodge*, L. R. 5 C. P. 73.

(*d*) 2 Inst. 146.

without impeachment of waste. Such permission vests the property of what is the subject of waste in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals. Where land was demised for a term of years, with liberty to the lessee to dig half an acre of brick-earth to a certain depth annually, and the lessee covenanted that if he dug more he would pay an increased rent of 375*l.* per annum per acre, and a stranger dug and took away brick-earth, it was held that the lessee was entitled to recover from the stranger the full value of such brick-earth (*e*).

Right of reversioners to enter upon lands in the possession of their lessees to inspect waste.—The law gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and if the lessee prevents the inspection, he is liable to an action for damages (*f*).

Injuries to lands and tenements from fire—The involuntary and unintentional burning of a house, through the negligence of the tenant or his servants, amounts, in contemplation of law, to no more than permissive waste; and for this a tenant-at-will or from year to year is not, as we have seen, responsible to the reversioner (*ante*, p. 245). Where the Countess of Shrewsbury brought an action against a lawyer of the Temple, and declared that she leased to him a house at will, "et quod ille tam negligenter et improvide custodivit ignem suum quod domus illa combusta fuit," it was held that the action was not maintainable, as it was in effect an action for permissive waste, for which a tenant-at-will was not answerable (*g*). Every landlord who demises buildings to a tenant must be taken to contemplate all the ordinary risks to which house property is exposed from fire and the negligence of servants intrusted with fire and candles (*h*); and if he wishes to be protected from these risks, he must either insure or take from his lessee a covenant to repair and maintain the premises. If he fails to do so, and the premises are destroyed by fire, without any gross or culpable negligence on the part of the tenant, the landlord will have no remedy for the loss. If the fire has been caused by such an amount of gross negligence as to give it the appearance of a wilful act, the party guilty of the misconduct, whether it be the tenant or a stranger to the demise, will be answerable for commissive waste.

Every tenant of a house is responsible for not taking care that

(*e*) *Attersoll* v. *Stevens*, 1 Taunt. 183

(*f*) *Hunt* v. *Downman*, Cro. Jac 478

(*g*) *Countess of Shrewsbury* v. *Crompton*, 5 Co. 13b.; Cro. Eliz 777; Tindal, C. J., 4 M. & Sc. 253; *Horsefall* v. *Mather*, Holt, N. P C. 9.

(*h*) Fortuna autem ignis, vel hujusmodi eventus inopinati, omnes tenentes excusat. Fleta, lib. i, cap. 12, s. 20.

the stop-cocks for regulating the supply of gas to a house are properly turned; and if these stop-cocks are negligently left open by the tenant or servants when the gas-lights are not burning, and an explosion ensues, and injures the house, the tenant will be responsible for the injury. But if a thief enters the house in the absence of the tenant, and cuts and carries away a gas-pipe without the knowledge of the tenant, or against his will, the latter is not then responsible for the resulting damage. When the entry of gas into a house is under the control of the occupants of the house, the gas company supplying the gas is not bound, on receiving notice that no more gas will be required, to stop the supply from the outside by putting on an outer stop-cock, or cutting off the communication between the gas-pipes in the interior of the house and the main in the street (*i*). In supplying gas to a house, a gas company is bound to use every reasonable precaution to prevent injury during the operation of "tapping the main" (*k*).

In an action for waste, it is no objection to the landlord's claim to substantial damages, or to the judgment of the Court, that the property has been improved in value by alterations made upon it, if those alterations have been made without the knowledge of the landlord, or in spite of his protest or objections. Thus, if a tenant convert a furze brake in which game have bred into arable or pasture land, by which its real value is much improved, but the landlord has objected to the improvement, preferring a furze brake with game to a cornfield without game, the landlord is entitled to substantial damages (*l*), and to judgment, whatever may be the damages recovered (*m*).

When the action is brought for a breach of duty by the defendant, in omitting or neglecting to restore or rebuild a house which the defendant has undertaken to maintain and keep up, and which has been accidentally burnt or destroyed, the measure of damages is not the cost of rebuilding the house. In such a case, the plaintiff can only recover the loss he has sustained by the actual deterioration of his property. And if the new house, when rebuilt, will be much more valuable to the plaintiff than the old house that was burnt or destroyed, the defendant is entitled to the benefit of the deduction of the increased value from the cost of the rebuilding (*n*).

Damages recoverable from a tenant who obstructs the reversioner in the exercise of his right to enter upon the demised premises to inspect waste.—We have already seen that the law

(*i*) *Holden* v. *Liv. Gas Co.*, 3 C. B. 14; 15 Law J. C. P. 304.

(*k*) *Blenkiron* v. *Gt. Central Gas Consumers' Co.*, 2 F. & F. 438.

(*l*) Heath, J., *Harrow School* v. *Alderton*, 2 B. & P. 86.

(*m*) *Pindar* v. *Wadsworth*, 2 East, 161.

(*n*) *Yates* v. *Dunster*, 11 Exch. 17; 24 Law J. Exch. 226; *Lukin* v. *Godsall*, 2 Peake, 15.

gives to the lessor, or him who hath the reversion, liberty to enter upon the lands of his lessee, to see if there be waste, to the intent that he may have his action, if there be cause for it; and, therefore if the lessee prevents the inspection, substantial damages may be recovered from him by reason of the infringement of the lessor's right, although no waste has actually been committed or damage done (o).

The courts will interfere by injunction to restrain lessees and mortgagees in possession from committing waste to the injury of the landlord or mortgagor; unless the wrongful act works a forfeiture of the estate, and the landlord has an immediate right of entry and fails to exercise it (p), or unless the parties have by their contract assessed the compensation in the shape of an increased rent or liquidated damages to be paid for the doing of the act (q), and not as a cumulative remedy (r).

Where a tenant from year to year received notice to quit, and then began to cut and damage the hedge-rows, and to take manure off the land and remove straw, &c., contrary to the course of good husbandry, the Court granted an injunction to stop the mischief (s). And where the tenant of a farm, having discovered valuable mineral deposits in a stream which ran from the Welsh mountains through his land, set to work to gather the minerals, and sell them, the court granted a perpetual injunction to restrain him from so doing (t). And so it will on a bill brought by a mortgagor, where the mortgagee in possession commits waste by cutting down timber, and the money arising from the sale of the timber is not applied in sinking the interest and principal of the mortgage. And where a mortgagor in possession commits waste, the court will, on a bill by the mortgagee, grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance (u).

Effect of acquiescence in the commission of waste.—It is a principle of equity, that when a person has stood by seeing an act done, and has consented to it, he cannot complain of that which he has himself expressly or impliedly authorised or permitted. Thus, where the plaintiff had demised a logwood-mill to the defendant, and the latter altered it to a cotton-mill of great value, and the plaintiff stood by and saw the cotton-mill erected at great expense, and made no objection, and afterwards approved of the

(o) *Hunt* v. *Dowman*, Cro. Jac. 478.
(p) *Lathropp* v. *Marsh*, 5 Ves. 259.
(q) *Woodward* v. *Gyles*, 2 Vern. 119; *Carnes* v. *Nesbitt*, 7 H. & N. 778; 30 Law J. Exch. 348; *Rolfe* v. *Peterson*, 2 Bro. P. C. 436.
(r) *London (City of)* v. *Pugh*, 4 Bro. P. C. 395.
(s) *Onslow* v. ——, 16 Ves. 173.
(t) *Thomas* v. *Jones*, 1 Y. & C. 510.
(u) *Farrant* v. *Lovel*, 3 Atk. 722.

defendant's planting about the mill, and the plaintiff then filed a bill for an injunction to restrain the defendant from using the mill as a cotton-mill, the court dismissed the bill, on the ground that the plaintiff had by his conduct encouraged the defendant to make the alteration (*x*).

Of the right of property in trees and bushes.—According to the old authorities, the general property in trees is in the landlord, and that in bushes is in the tenant, although if he exceeds his right—as by grubbing up or destroying fences—he may be liable to an action for waste. The tenant has the general property in the cuttings of a hedge, whoever cuts it (*y*).

Defeasible leases.—The lessor may reserve to himself a right to determine the lease and resume possession of the demised premises at any time on giving notice of his intention to the lessee (*z*). If a lease is made defeasible at the option of either of the parties, it may be determined by the lessor by a simple demand of possession, or the tenant may quit the demised premises and release himself from his contract by tendering possession to the landlord; but, if the lease is made determinable at the expiration of three, six, or nine years, or any particular interval of time, reasonable notice of the intention to determine the contract must be given by the party who intends to avail himself of the power of defeasance (*a*). If the lease is made determinable at the expiration of a certain time, if the parties shall think fit, both must concur in determining the lease (*b*). If power to determine the lease after a certain time is reserved, without saying by whom it is to be exercised, the law gives it to the lessee (*c*). If an agreement is entered into for a yearly tenancy, with a proviso for determining it in the middle of the year, such a proviso does not prevent it from being a yearly tenancy. When the party is in, he is in of the whole estate for a year, liable to a defeasance on a particular event. So, where there is a lease for twenty-one years, determinable at the end of seven or fourteen years, the party, when he enters, is in of a term of twenty-one years, but a defeasible term, and which may determinate by matter *ex post facto* (*d*). When the lease is determinable by notice, the notice may be given at any time, if no particular period for giving it is specified (*e*); but it must be in strict conformity with the terms of the power of defeasance; and, when

(*x*) *Brydges* v. *Kilburne*, cited *Jackson* v. *Cator*, 5 Ves. 688; *Harrow School* v. *Alderton*, *ante*, p. 257; *Rex* v. *Butterton*, 6 T. R. 555; *E. I. Co.* v. *Vincent*, 2 Atk. 82; *Parrott* v. *Palmer*, 3 Myl. & K. 640.

(*y*) *Berriman* v. *Peacock*, 9 Bing. 384.

(*z*) *Doe* v. *Kennard*, 12 Q. B. 244; *Liddy* v. *Kennedy*, L. R. 5 H. L. 134.

(*a*) *Goodright* v. *Richardson*, 3 T. R. 462.

(*b*) *Fowell* v. *Franter*, 34 L. J. Ex. 6.

(*c*) *Dann* v. *Spurrier*, 3 B. & P. 399.

(*d*) *Rex* v *Herstmonceaux*, 7 B. & C. 555.

(*e*) *Bridges* v. *Potts*, 17 C. B. N. S. 314, 33 L. J. C. P. 338.

performance of all the covenants that have been entered into by the lessee is made a condition precedent to his right to determine the lease, these covenants must be strictly fulfilled (*f*).

Disclaimer and forfeiture.—If a tenant from year to year disclaims the title of his lessor; if he claims the land as his own, and refuses to pay rent on the ground that he is himself the owner, or if he attorns or delivers up possession to a stranger, or professes to sell or grant the property to another; if he cuts down timber, pulls down or alters dwelling-houses, or obliterates fences, boundaries, and land-marks, or opens and digs mines and quarries against the will of the landlord, the tenancy is determinable by the latter, and he has a right of re-entry upon the property, and may forthwith recover possession of the demised premises (*g*). Acts of this description on the part of a tenant from year to year work a forfeiture of his term and interest, and convert the possession into an adverse possession, so that the tenant may at once be proceeded against without any notice to quit and without any demand of possession (*h*). But, if the lessor dies, and adverse claimants to the property appear and demand the rent of the tenant, and the latter refuses to pay it until the conflicting claims have been ascertained and settled, the refusal is not such a disclaimer of the title of the real owner as will justify the latter in treating the tenant as a trespasser (*i*). "To constitute a disclaimer (by words), there must be a renunciation by the party of his character of tenant, either by setting up the title of a rival claimant, or by asserting a claim of ownership in himself" (*k*). A mere refusal to pay rent, or a declaration by the tenant that he will continue to hold possession, or an omission to acknowledge the landlord as such by requesting further information as to title, when the property has changed hands, does not render the tenancy an adverse tenancy and possession (*l*). All verbal disclaimers operating as a forfeiture of the tenant's interest in, and right of possession of, the demised premises, and dispensing with the necessity of a notice to quit, are restricted to tenancies from year to year. A lease for a definite term of years cannot be forfeited by mere words (*m*). And if, after a disclaimer by a tenant from year to year, the landlord puts in a distress for rent which became due subsequently to the disclaimer, such distress is a waiver of the disclaimer, and again clothes the

(*f*) *Friar* v. *Grey*, 15 Q. B. 899; 5 Exch. 584.

(*g*) *Jones* v. *Mills*, 10 C. B. N. S. 788; 31 L. J. C. P. 66. See, however, now, as to relief against forfeiture, *infra*, p. 258.

(*h*) *Doe* v. *Frowd*, 1 M. & P. 480; 4 Bing. 557; *Doe* v. *Flynn*, 1 C. M. & R. 137; *Doe* v. *Pittman*, 2 N. & M. 673; *Vivian* v. *Moat*, 16 Ch. D. 730.

(*i*) *Doe* v. *Pasquali*, 1 Peake, 259; *Swinfen* v. *Bacon*, 6 H. & N. 846; 30 L. J. Ex. 368.

(*k*) *Doe* v. *Cooper*, 1 Sc. N. R. 41; *Hunt* v. *Allgood*, 30 L. J. C. P. 313; 10 C. B. N. S. 253.

(*l*) *Doe* v. *Cawdor*, 1 C. M. & R. 398; *Doe* v. *Stanion*, 1 M. & W. 703.

(*m*) *Doe* v. *Wells*, 10 Ad. & E. 436.

tenant with a lawful possession (*n*). Forfeiture is also incurred by the breach of conditions annexed to the demise; for the lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they are not illegal or repugnant to the grant itself, and upon the breach of those conditions may avoid the lease (*o*). But the law does not favour forfeitures of estates; and strict proof of a breach of a condition or covenant working a forfeiture of a lease is always required (*p*); and now relief against forfeiture can be obtained under the Conveyancing and Law of Property Act, 1881. See *post*, p. 261.

Provisos for re-entry.—It is frequently made a term or condition of the demise, that the lease shall be forfeited and the lessor have a right to re-enter and re-possess himself of the demised premises for a breach of particular covenants contained in a lease. The right to take advantage of a proviso of this description is, of course, confined to the lessor and the assignee of the reversion or part of the reversion (*q*); and the lessee cannot be permitted to set up his own breach of contract as an avoidance of the lease; for no man is permitted to take advantage of his own wrong (*r*). If it is provided that, in case of non-payment of rent, it shall be lawful for the lessor "to enter upon the premises for the same until it be fully satisfied," the lessor will be entitled to enter and hold possession until the arrears of rent are satisfied; but, when they are satisfied, the lessee will be entitled to re-enter and hold under the lease as before (*s*). It should seem that a power of re-entry upon the lessee "wilfully failing or neglecting to perform" any covenant, does not apply to a breach of a negative covenant (*t*), but a power to re-enter if the lessee does not "observe perform and keep" the covenants, does apply to a breach of a negative covenant (*u*). Provisos in leases for re-entry in case of non-payment of rent or non-performance of covenants are not "to be construed with the strictness of conditions at common law; but, being matters of contract between the parties, they should be construed like all other contracts" (*x*). Where the lessee was to hold in consideration of the rent "and conditions" contained in the lease, and it was stipulated and "conditioned" that the lessee should not assign or underlet, it was held that the lease was forfeited, and that the lessor had a right to re-enter, on an assignment being made by the lessee (*y*). An agreement to hire a messuage

(*n*) *Doe* v. *Williams*, 7 C. & P. 322.
(*o*) Bac. Abr. LEASES, T. 2.
(*p*) 1 Wms. Saund. 287, b., 288, i.; 1 Mad. ch. 36.
(*q*) 22 & 23 Vict. 35, s. 3.
(*r*) *Reid* v. *Parsons*, 2 Chit. 248; *Doe* v. *Birch*, 1 M. & W. 402; *Jones* v. *Carter*, 15 M. & W. 725.
(*s*) Co. Litt. 203; *Doe* v. *Bowditch*, 15 L. J. Q. B. 267.
(*t*) *Hyde* v. *Warden*, 3 Ex. D. 72, C. A.
(*u*) *Evans* v. *Davis*, 10 Ch. D. 747.
(*x*) *Doe* v. *Elsam*, M. & M. 191; *Hayne* v. *Cummings*, 16 C. B. N. S. 425.
(*y*) *Doe* v. *Watt*, 8 B. & C. 308.

at a certain rent is an agreement to pay that rent; and, therefore, if a power of re-entry is reserved "in case of breach of any of the agreements" contained in the written instrument of demise, the lessor may re-enter for non-payment of rent (z). Where a lessee covenanted to pay rent and not to assign, and there was a proviso for re-entry if the rent was in arrear, or all or any of the covenants "hereinafter contained" on the part of the lessee should be broken, and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor, that the lessee paying the rent, &c., should quietly enjoy, it was held that the lessor could not enter for breach of the covenant not to assign, as the proviso was restrained by the word "hereinafter" to subsequent covenants, and there were none such in the lease (a). Where there is a proviso for re-entry in case of non-performance of covenants, and the lease contains a general covenant to repair, and also a covenant to repair within a certain time after notice, the landlord may at once enter for breach of the general covenant (b); but, if he gives notice under the second covenant, this is a waiver of the forfeiture incurred by breach of the general covenant, and he cannot recover possession until after the time limited by the notice has expired (c). A notice to repair "in accordance with the covenants," or "forthwith," will not, however, amount to a waiver of the forfeiture incurred by a breach of the general covenant (d). Where a right for re-entry for waste is reserved, the proviso is understood to mean such waste as is injurious to the reversion (e). Where there is a proviso for re-entry for breach of a covenant to insure and keep insured, it does not mean that the lessee shall keep any one particular policy on foot, but that he shall always keep the premises insured by some one policy or another; and the breach will be a continuing breach so long as they remain uninsured (f).

A power of re-entry, in case the lessee carries on any trade or business upon the demised premises, authorises the lessor to re-enter if a school is established (g). But, when particular trades or occupations are specified, no trade or business which does not clearly fall within the description contained in the lease will come within the proviso (h). A proviso for re-entry may be reserved in case the tenant should become bankrupt or insolvent (i), or the term granted should be taken in execution by the sheriff (k); and,

(z) *Doe* v. *Kneller*, 4 C. & P. 3.
(a) *Doe* v. *Godwin*, 4 M. & S. 265.
(b) *Baylis* v. *Le Gros*, 4 C. B. N. S. 537.
(c) *Doe* v. *Meux*, 4 B. & C. 606
(d) *Few* v. *Perkins*, L. R. 2 Ex. 92; 36 L. J. Ex. 54; *Roe* v. *Paine*, 2 Campb. 520.
(e) *Doe* v. *Bond*, 5 B. & C. 855.
(f) *Doe* v *Peck*, 1 B. & Ad. 428.
(g) *Doe* v. *Keeling*, 1 M. & S. 95.
(h) *Jones* v. *Thorne*, 1 B. & C. 715.
(i) *Roe* v. *Galliers* 2 T. R. 133; *Doe* v. *Ingleby*, 15 M. & W. 465.
(k) *Rex* v. *Topping*, M'Cl. & Y. 544.

if the contingency provided for happens, the lessor will be entitled to take possession, and to enjoy the emblements (*l*). If a proviso for re-entry is insensible, it is of course nugatory; for the court cannot find a meaning for that which has no meaning (*m*). If the lessor has the custody of the lease, and has in any wise misrepresented the nature of the proviso, or of the covenants to be fulfilled, or has withholden any necessary information from the lessee, or done anything to entrap the latter into a forfeiture, the law will not permit the lessor to avail himself of such forfeiture; for that would be permitting him to take advantage of his own wrong (*n*). When a party is let into possession under an agreement for a future lease, which is to contain certain covenants and a proviso for re-entry in case of the non-performance of those covenants, the tenant holds, as we have before seen, subject to all such of the terms of the intended lease as are applicable to a yearly tenancy; and if, bef[illegible]e lease is granted, the lessee does an act which would have [illegible]ed a forfeiture of the lease had it [illegible] been granted, the landlord [illegible]ave a right to re-en[illegible]ter, and may forthwith recover possession ([illegible]

Effect of re-entry [illegible] [illegible]ssee's liability on his covenants.—The forfeiture of the lease does not extinguish the liability of the lessee in respect of breaches of covenant that had accrued at the time of the forfeiture, so that the lessor, by taking advantage of the forfeiture and re-entering, does not deprive himself of his remedies upon the covenants of the lease for any breach of those covenants up to the time of the re-entry (*p*). If the landlord does not think fit to avail himself of the forfeiture, the liability of the lessee upon the covenants of the lease remains unaffected by the forfeiture; but, if the landlord brings an action of ejectment, he cannot, in general, sue the lessee in respect of breaches of covenant that have accrued subsequently to the commencement of the action (*q*).

Waiver of a forfeiture.—Lessor's right of election.—The right of entry for forfeiture of a lease is governed by the general law that, where a man has got a right to elect to do a thing to the injury of another, his election, when once made, is final and conclusive, and he cannot afterwards alter his determination. If, therefore, a lease has been forfeited, and there is an election on the part of the landlord to enter and defeat the lease or not as he pleases, and he by word or act manifests his intention that the

(*l*) *Davis* v. *Eyton*, 7 Bing. 154.
(*m*) *Doe* v. *Carew*, 2 Q. B. 317.
(*n*) *Doe* v. *Rowe*, Ry. & Mood. 346.
(*o*) *Doe* v. *Amy*, 12 Ad. & E. 476; *Doe* v. *Elkins*, Ry. & M. 29; *Hayne* v. *Cumming*, 16 C. B. N. S. 421.
(*p*) *Hartshorne* v. *Watson*, 5 Sc. 506; 4 Bing. N. C. 178.
(*q*) *Jones* v. *Carter*, 15 M. & W. 718.

lease shall continue, he waives the forfeiture, and cannot afterwards annul the lease. If, knowing of a forfeiture, he nevertheless tells his tenant that he is still tenant, and that he shall hold him to the covenants and stipulations of his lease, the election is made, and the landlord cannot afterwards enter for the forfeiture (r). On the other hand, if he brings ejectment for the forfeiture, he unequivocally declares his election to determine the lease; and a subsequent distress is no waiver of the forfeiture (s). Acceptance of rent, or demand of rent, or the bringing of an action for rent, or distraining for rent, accruing due after a forfeiture, will be considered as strong evidence of the lessor's determination to continue the lease and waive the forfeiture, if it appears that, at the time the lessor received the rent, he had notice of the breach of the condition (t). A forfeiture for not repairing may be waived by the receipt of rent which became due after the right of entry accrued, but not by the receipt of rent becoming due before the expiration of a notice to repair. A forfeiture is suspended, but not waived, by allowing a tenant further time to repair (u). A waiver of one forfeiture does not prevent the lessor from availing himself of subsequent forfeitures (x); and a receipt of rent is no waiver of a continuing breach of a covenant to repair (y). Where a breach of covenant has continued upwards of twenty years with full knowledge of it on the part of the lessor, and no attempt has been made to take advantage of it, neither the lessor nor his assignee can avail himself of the breach to work a forfeiture (z).

Relief against forfeiture.—Breach of covenants or conditions respecting insurance or payment of rent.—With respect to leases made before or after the commencement of the Conveyancing and Law of Property Act, 1881, and notwithstanding any stipulation to the contrary, relief will now be given against forfeiture (except in cases of non-payment of rent, or breach of covenant not to assign or underlet, or bankruptcy or execution) (a), unless notice has been given requesting the lessee to remedy the breach and make compensation, and the lessee has failed to comply (b). No relief would formerly be granted in the case of forfeiture for the breach of any

(r) *Ward* v. *Day*, 33 L. J. Q. B. 13, 254; 4 B. & S. 337; 5 B. & S. 359.

(s) *Grimwood* v. *Moss*, L. R. 7 C. P. 360; 41 L. J. C. P. 239.

(t) Bac. Abr. LEASES, tit. 2; *Ward* v. *Day*, *supra*; *Denby* v. *Nicholl*, 4 C. B. N. S. 376; 27 L. J. C. P. 220; *Croft* v. *Lumley*, 27 L. J. Q. B. 321; 5 E. & B. 648; *Cotesworth* v. *Spokes*, 30 L. J. C. P. 221; *Pellatt* v. *Boosey*, 31 L. J. C. P. 281.

(u) *Doe* v. *Meux*, 4 B. & C. 606; and see *Few* v. *Perkins*, *ante*, p. 259.

(x) *Doe* v. *Bliss*, 4 Taunt. 735; 23 & 24 Vict. c. 38, s. 6.

(y) *Doe* v. *Jones*, 5 Exch. 498; 19 L. J. Ex. 405.

(z) *Gibson* v. *Doeg*, 2 H. & N. 615; 27 L. J. Ex. 37.

(a) And in a mining lease, except as to covenants to allow access to books, &c. As to forfeiture for non-payment of rent, 23 & 24 Vict. c. 126, s. 1; and see Woodfall, 291—298, 11th ed.

(b) 44 & 45 Vict. c. 41, s. 14; the lessee may apply for relief in an action by the lessor.

covenant other than covenants to pay rent or insure, except in the case of accident, mistake, or fraud (c), or where the tenant has been misled by the conduct of the landlord amounting to a waiver (d).

Assignment after forfeiture.—A right of entry which has accrued on a forfeiture cannot be assigned; and the assignee of the reversion, therefore, cannot take advantage of any forfeiture incurred before the assignment; but he is entitled to the benefit of the covenant, and of the condition of re-entry, in respect of any subsequent or continuing breach (e).

Surrender—Deeds and agreements of surrender.—We have already seen that a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, is void, unless it is made by deed (*ante*, p. 179). An estate for life or years, which cannot be created without deed, cannot be surrendered without deed (f). But, if the estate may be created, and has been created, without deed, it may be surrendered without deed (g). It is said that a surrender under seal immediately divests the estate out of the surrenderor and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and, though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent, yet that consent is implied. A gift imports a benefit; and an *assumpsit* to take a benefit may well be presumed: and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest the property (h). But this must be understood only of surrenders of particular estates which are manifestly beneficial to the surrenderee. If the benefit is equivocal there will be no implied assent or acceptance, and the surrender will be nugatory without the express concurrence of the surrenderee (*post*, p. 264). If the tenant holds under a parol demise for a term not exceeding three years, the term may be surrendered by an agreement in writing, signed by the surrenderor and the surrenderee, provided it is intended to have an immediate effect. There cannot be a surrender to take place *in futuro*. If anything is to be done by either or both of the parties before the estate of the termor is to be extinguished, the transaction amounts only to a covenant or agreement to surrender, and there is no actual surrender by the tenant, and no right of entry on the part of the

(c) *Gregory* v. *Wilson*, 9 Hare, 689.

(d) *Hughes* v. *Met. Ry. Co.*, 2 Ap. Cas. 439.

(e) *Crane* v. *Batten*, 23 Law T. R. 220.

(f) Shep. Touch. 397; DEFEASANCE; Co. Litt. 338, a.; 1 Wms. Saund. 236, a.; *Perkins* v. *Perkins*, Cro. Eliz. 269; *Lyon* v. *Reed*, 13 M. & W. 310.

(g) *Farmer* v. *Rogers*, 2 Wils. 26.

(h) *Thompson* v. *Leach*, 2 Salk. 617.

landlord by the mere force of the contract (*i*). An insufficient notice to quit, therefore, accepted in writing under the landlord's signature, does not of itself amount to a surrender of the term if it is to operate *in futuro* (*k*). But an agreement between a landlord and a tenant holding a parol demise from year to year, that the tenancy should be determined, followed by the departure of the tenant, and an entry and taking of possession on the part of the landlord, becomes an actual surrender by act and operation of law (*l*). Where a dispute arose between a yearly tenant and the landlord, and the tenant said to the landlord, "I shall quit," and the latter said, "You may do so, and I shall be glad to get rid of you," and the tenant then removed her furniture and sent the keys of the house to the landlord, and the latter accepted them and took possession, it was held that there was a surrender of the lease by operation of law (*m*). But the mere delivery and acceptance of the key, without any entry on the demised premises and taking of possession by the landlord, would be no evidence of a surrender (*n*); and an abandonment of the demised premises by the tenant, and an entry of the landlord thereon for the purpose of repairing them, or airing or drying the rooms, or letting them, and not with a view of taking possession as owner, will not of course amount to a surrender (*o*).

Surrenders by act and operation of law "take place where the owner of a particular estate has been a party to some act, the validity of which he is afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. Thus, if a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former lease. So, if there be a tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman; and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if a tenant for

(*i*) *Coupland* v. *Maynard*, 12 East, 134; *Weddall* v. *Capes*, 1 M. & W. 51; *Forquet* v. *Moore*, 7 Exch. 870; 22 L. J. Ex. 35.

(*k*) *Johnstone* v. *Huddlestone*, 7 D. & R. 419; 4 B. & C. 922; *Doe* v. *Milward*, 3 M. & W. 332.

(*l*) *Dodd* v. *Acklom*, 7 Sc. N. R. 423; 2 Smith's Leading Cas., 5th ed., 713—719; *Furnivall* v. *Grove*, 30 L. J. C. P. 3.

(*m*) *Grimman* v. *Legge*, 8 B. & C. 324; *Phenè* v. *Popplewell*, 12 C. B. N. S. 334; 31 L. J. C. P. 235; see also *Oastler* v. *Henderson*, 2 Q. B D. 575.

(*n*) *Cannan* v. *Hartley*, 19 L. J. C. P. 323.

(*o*) *Bessell* v. *Landsberg*, 7 Q. B. 638; *Griffith* v. *Hodges*, 1 C. & P. 419.

years accepts from his lessor a grant of a rent issuing out of the land, and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent; and, as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. The acts *in pais* which bind parties by way of estoppel are all acts which anciently were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining: and then the legal consequences followed" (*p*). But, if the original lease is under seal, the acceptance by the lessee of a mere parol demise from the lessor will not amount to a surrender of such original lease (*q*); and, if the new lease is wholly or partially invalid, and does not pass an interest according to the contract and the intention of the parties, it will not operate as a surrender of the former lease (*r*). A mere agreement for an increased rent will not have the effect of creating a new tenancy (*s*).

Substitution of a new tenant in the place of the original tenant.—When there is an open and notorious shifting of the actual possession of corporeal property, in execution of an agreement between the lessor and lessee and a third party, to substitute such third party as the lessee in the place of the original lessee, there is a surrender by operation of law of such original lease (*t*). But a mere agreement for the substitution of a new tenant, not followed up by any actual change of possession, or a mere change of possession, unaccompanied by an agreement of substitution, does not amount to a surrender (*u*). It must be shown that the incoming tenant has been expressly received and accepted by the landlord as his lessee, in the place and stead of the original lessee, by the mutual agreement of all parties (*x*); for the mere change of the possession is no evidence of the grant and acceptance of a new lease, the *primâ facie* presumption being that the incoming tenant has entered and taken possession as the under-tenant or assignee of the original lessee (*y*). The mere

(*p*) *Lyon* v. *Reed*, 13 M. & W. 306, 2 Smith's Lead. Cas. 5th ed. 714–720.

(*q*) Shep. Touch. 397.

(*r*) *Doe* v. *Poole*, 11 Q. B. 713; 17 L. J. Q. B. 143, *Doe* v. *Courtney*, *ib.* 702, 151.

(*s*) *Geekie* v. *Monk*, 1 C. & K. 307; *Doe* v. *Geekie*, 5 Q. B. 841; *Crowley* v. *Vitty*, 7 Exch. 319.

(*t*) *Dodson* v. *Gent*, 1 H. & N. 744; 26 L. J. Ex. 122, *Nickells* or *Nicholls* v. *Atherstone*, 10 Q. B. 944; 16 L. J. Q. B. 371, *Reeve* v. *Bird*, 1 C. M. & R. 31, *Walls* v. *Atcheson*, 11 Moore, 379; *Woodcock* v. *Nuth*, 1 M. & Sc. 317; *Thomas* v. *Cook*, 2 B. & Ald. 120.

(*u*) *Taylor* v. *Chapman*, Peake's Add. Cas. 19; *Cocking* v. *Ward*, 1 C. B. 868; *Kelly* v. *Webster*, 12 C. B. 283; 21 L. J. C. P. 163.

(*x*) *Graham* v. *Whichelo*, 1 Cr. & M. 194; *M'Donnell* v. *Pope*, 9 Hare, 707; *Matthews* v. *Sawell*, 2 Moore, 262; 8 Taunt. 270.

(*y*) *Doe* v. *Williams*, 9 D. & R. 30; 6 B. & C. 41.

circumstance of the landlord's having accepted rent from an assignee or under-tenant in possession of the demised premises is no evidence of an acceptance of such assignee or under-tenant as his lessee in the place of the original lessee, the *primâ facie* presumption being that the rent was paid by the latter as the agent of the original lessee and on his behalf (*z*).

Surrender and acceptance of surrender by joint-tenants.—Every act done by one joint-tenant which is for the benefit of his companions will bind them; but those acts which prejudice his companions in estate will not bind them; and, if the benefit be doubtful, two joint-tenants have no right to elect for the third. A surrender, therefore, or acceptance of a surrender, by one of several joint-tenants, will not, in general, bind the others (*a*). If, however, one of two joint-lessors lies by and allows the other to act for him, and acquiesces in the acts of his co-owner, and intrusts the whole management of the business in which they are jointly interested to him, he will be bound by his acts (*b*).

Non-extinguishment by surrender of derivative estates.—If a lessee from year to year grants an underlease of part of the premises demised to him, and then surrenders his term, the surrender will not destroy the estate and interest of the underlessee, if the latter has not concurred in and been a party to the surrender (*c*).

Effect of the surrender on existing breaches of covenant.—The mere surrender of the lease does not relieve the lessee from his liability in respect of breaches of covenant that have accrued prior to the surrender. The lessor, therefore, after a surrender, remains a specialty creditor for all arrears of rent, which become due before the surrender, upon the lessee's covenants for the payment of rent (*d*).

Notice to quit, when necessary.—"When a lease is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term" (*e*). If, therefore, a lease is granted for a term of years, or for one year only, no notice to quit is necessary at the end of the term (*f*); but, if the tenancy is from year to year, a half-year's notice must be given on either side in order to determine the tenancy, and this notice may be given in the first as well as in any subsequent year of the tenancy (*g*). If a

(*z*) *Copeland* v. *Gubbins*, 1 Stark. 96; *Doe* v. *Wood*, 15 L. J. Ex. 41.

(*a*) *Right* v. *Cuthell*, 5 East, 498.

(*b*) *Dodd* v. *Acklom*, 7 Sc. N. R. 415; 6 M. & Gr. 672.

(*c*) Co. Litt. 338, b.; 4 Geo. 2, c. 28, s. 6; *Pleasant* v. *Benson*, 14 East, 237; *Cousins* v. *Phillips*, 3 H. & C. 892; 35 L. J. Ex. 84; *Gt. Western Ry. Co.* v. *Smith*, 2 Ch. D. 235; 3 Ap. Cas. 165.

(*d*) *Attorney-General* v. *Cox*, 3 H. L. C. 240.

(*e*) *Right* v. *Darby*, 1 T. R. 162; *ib.* 54.

(*f*) *Cobb* v. *Stokes*, 8 East, 358.

(*g*) *Doe* v. *Smaridge*, 7 Q. B. 959; *Doe* v. *Nainby*, 16 L. J. Q. B. 303; *Doe* v. *Geekie*, 5 Q. B. 841.

man holds under an agreement for a lease, or under a lease void by reason of its not having been made by deed, for the full term intended to have been granted, an ejectment may be brought against him at the expiration of such term without any notice to quit (*h*). In the case of a tenancy at will no notice to quit is necessary; but there must be a formal demand of possession, or notice of the determination of the will, on the part of the landlord, before any action of ejectment can be brought (*i*). The tenant at will, too, in order to discharge himself from his liability for rent, or for a reasonable compensation for the use and enjoyment of the demised premises, must give notice to the landlord of the fact of his abandonment of the possession, and of his election to rescind the contract and put an end to the tenancy. If the occupation is the occupation of a servant or agent holding possession of the premises on account and on behalf of his master or principal, the possession of the occupier is the possession of the owner himself, and the latter may at any time remove the tenant, and resume possession of the property without any notice to quit (*k*). If the tenancy and possession are adverse, or if the occupier holds over after the expiration of a lease, or after a forfeiture, or after an agreement for a lease or a contract of sale has gone off and been abandoned, or after the tenancy has been determined by a dissolution of partnership, and continues in possession without the permission and against the will of the owner, no notice to quit is necessary; but the owner may at once proceed against the wrongdoer, by action of ejectment for the recovery of the demised premises, or he may enter and take possession if the tenant leaves the demised premises vacant (*l*).

If the lessor is only tenant-at-will, or has made a prior lease of the lands, or mortgaged them so as to give the mortgagee a right of entry and to deprive himself of the power of granting a lease for the term specified, the tenant may be turned out without any previous notice to quit from the party who has title (*m*). But, if the lessor at the time of making of the lease had full right and title to grant the demised premises to the lessee for the term, any subsequent grant, mortgage, sale, or lease, cannot affect the tenant's right of possession, or in any way dispense with the ordinary notice to quit.

How the notice may be given, and by whom.—A notice to quit

(*h*) *Doe* v. *Stratton*, 1 M. & P. 187: *Tress* v. *Savage*, 4 E. & B. 36; 23 L. J. Q. B. 339.

(*i*) *Right* v. *Beard*, 13 East, 210; *Doe* v. *Rawlins*, 10 East, 261; *Doe* v. *Cox*, 11 Q. B. 122; 17 L. J. Q. B. 3.

(*k*) *Doe* v. *Derry*, 9 C. & P. 494; *Mayhew* v. *Suttle*, 4 E. & B. 347; 24 L. J. Q. B. 54; *White* v. *Bailey*, 30 L. J. C. P. 253.

(*l*) *Doe* v. *Sayer*, 3 Camp. 8; *Doe* v. *Miles*, 1 Stark. 181; *Doe* v. *Black*, 8 C. & P. 464.

(*m*) *Keech* v. *Hall*, 1 Doug. 21.

may be given orally by the lessor, or by his agent (*n*), unless there has been an express agreement or stipulation for a notice in writing (*o*). A mere receiver of rents has no implied authority to give a notice to quit; but an agent or receiver who is intrusted with the general management of landed property, and has a general authority to let lands from year to year, has also authority to determine such tenancies by a notice to quit (*p*). And he may give the notice in his own name, as it is not necessary that his agency and the authority of his principals should appear on the face of the document (*q*). The steward of a corporation, who is intrusted with the letting of the corporate estates, may give a notice to quit, and needs no authority under seal from the corporation for the purpose (*r*). If there are several joint-lessors or joint-owners of the property, a notice to quit, given or signed by one or more of them, on behalf of all, is sufficient (*s*); and the subsequent assent of such joint-owners to a notice previously given by one or more of them, on behalf of all, is equivalent to a precedent authority (*t*). But, if it is expressly provided by the agreement of the parties that a written notice shall be given by all of them, under their respective hands, the notice must be signed by all, and a ratification given afterwards will not do (*u*). The notice may also be given by an agent on their behalf; but such notice, in order to be valid and effectual, must be given in the names of the joint-owners, the principals, and not in the name of the agent, unless the agent has a general authority to let their lands (*x*); and the agent ought to have authority to give the notice at the time it begins to operate; for, if the tenant could not safely have acted upon the notice at the time it was given, no subsequent recognition of it by the landlord will make it valid (*y*). If one or more of several joint-owners dissent from the notice, such of them as have joined in giving the notice to quit are entitled to enter into and hold possession of the demised premises, and receive the rents and profits of the land, jointly with the tenant or lessee of the others who have refused to join in such notice (*z*).

Form and effect of the notice.—Alternative and peremptory notices.—A notice to quit "all the property you hold of me," addressed to the tenant, is a sufficient description of the demised premises; and any general description applicable to the whole of

(*n*) *Timmins* v. *Rawlinson*, 3 Bur. 1603; *Doe* v. *Crick*, 5 Esp. 196.

(*o*) *Legg* v. *Benion*, Willes, 43.

(*p*) *Doe* v. *Mizem*, 2 M. & Rob. 56.

(*q*) *Jones* v. *Phipps*, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198.

(*r*) *Roe* v. *Pierce*, 2 Campb. 96.

(*s*) *Doe* v. *Hulme*, 2 M. & R. 433; *Doe* v. *Summersett*, 1 B. & Ad. 135; *Alford* v. *Vickery*, 1 Car. & M. 280.

(*t*) Abbott, C. J., 3 B. & Ald. 692.

(*u*) *Right* v. *Cuthell*, 5 East, 497.

(*x*) *Jones* v. *Phipps*, *supra*.

(*y*) *Doe* v. *Walters*, 10 B. & C. 626; 5 M. & R. 357; *Doe* v. *Goldwin*, 2 Q. B. 146; *Goodtitle* v. *Woodward*, 3 B. & Ald. 689.

(*z*) *Doe* v. *Chaplin*, 3 Taunt. 120.

the property will suffice (*a*). But a landlord cannot give a notice to quit which is intended to apply to a part only of premises which have been demised together at one entire rent (*b*). A mere misdescription, however, of the premises comprised in the notice to quit, or a mistake in the Christian name of the tenant to whom such notice is addressed, does not invalidate the notice, provided the tenant has not been misled or prejudiced by such misdescription or mistake. If the notice applies to a year that is past, but was clearly intended to apply to the coming year, and the tenant must have known what time was meant, he is bound by the notice (*c*). If the notice is not a peremptory notice to quit, but is drawn up in the alternative, and seems to have been intended either to put an end to the lease or obtain an increased rent, the tenant may elect to remain in possession, paying an increased rent; and, such an option having been accorded to him, he cannot, if he chooses to occupy, be treated as a trespasser and wrongdoer and turned out of possession. If, however, the notice is a notice to quit or pay double the annual value under the statutes imposing penalties on tenants for holding over after a notice to quit, the alternative notice so given will be construed as a peremptory notice to quit, accompanied by a warning to the tenant of the penal consequences of disobedience, and not as an offer on the part of the landlord of a new bargain and a new lease at an increased rent (*d*). And where a notice to quit on a day terminating the tenancy went on to say, "And I hereby further give you notice that, should you retain possession of the premises after the day before mentioned, the annual rental of the premises now held by you from me will be £160, payable quarterly in advance, it was held by Bramwell and Cotton, L. JJ., Brett, L. J., dissenting, that the notice was not rendered invalid by the addition (*e*).

Length of the notice.—We have already seen that, in the case of a tenancy from year to year, six calendar months' notice to quit is required to be given prior to the expiration of the current year of hiring, in order to determine the tenancy between the parties (*f*). But, whenever the tenancy commences and ends at any of the usual feasts, the customary half year intervening between two half-yearly feasts constitutes a half-year's notice, although the inter-

(*a*) *Doe* v. *Church*, 3 Campb. 71.

(*b*) *Doe* v. *Archer*, 14 East, 245, except under the Agricultural Holdings Act, 38 & 39 Vict. c. 92, s. 52, where a tenancy from year to year may be determined by notice as to part of the holding at for the purpose of making certain improvements, see some of the provisions of this Act, *post*, p. 283.

(*c*) *Doe* v. *Roe*, 4 Esp. 185; *Doe* v. *Wilkinson*, 12 Ad. & E. 743; 4 P. & D. 323; *Doe* v. *Spiller*, 6 Esp. 70; *Doe* v. *Kightley*, 7 T. R. 63.

(*d*) *Doe* v. *Jackson*, 1 Doug. 175.

(*e*) *Ahearn* v. *Bellman*, 4 Ex. D. 201.

(*f*) *Ante*, p. 265; but see *Rogers* v. *Kingston-upon-Hull Dock Company*, 34 L. J. Ch. 165.

mediate time be not exactly six calendar months (*g*). And where the tenancy commenced on a feast day, and notice was given on the *26th of March* to quit on the 29th September, it was held bad, although there were more than 183 days intervening (*h*). Although rent may be payable under the lease on the usual feast days, yet the length of notice required by the terms of the lease may be six calendar months, in which case a notice given on the 29th September to quit on the 25th March would be bad, as there were not six calendar months intervening. Under the Agricultural Holdings Act, 1875 (*i*), where a half-year's notice expiring with the year of the tenancy is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall, by virtue of this Act, be necessary and sufficient for the same. It has been held that this does not apply to a yearly tenancy where, by express agreement (*k*), the tenancy is determinable on *six months'* notice, not a *half year's* notice (*l*).

Of the time of quitting specified in the notice.—If the time at which the tenant is to quit is specified in the notice, care must be taken to make such time correspond with the termination of the term of hiring, unless the notice is given in the exercise of a power to determine the tenancy expressly reserved in the lease or agreement (*m*); for, if the term expires at one period, and the notice is to quit at another, such notice is bad, and the lessor cannot safely act upon it (*n*). If a tenant holds possession of a house as a tenant from year to year, under an agreement to quit at a quarter's notice, the tenant cannot be expelled at the expiration of any quarter that the lessor may choose to select, but the notice must be a quarter's notice to quit at the expiration of the current year (*o*). If the hiring is from half-year to half-year, determinable by six months' notice to quit, the tenancy may be determined by notice at the expiration of any half-year (*p*). If it is a quarterly, a monthly, or a weekly hiring, the notice must be a notice to quit at the expiration of the current quarter, month, or week; if it breaks into the middle of the quarter, month, or week, it is not a good notice to quit. If the hiring is from month to month, and the rent is made payable weekly, a notice to quit at the expiration of the current month must be given, and not a notice expiring at any one of the

(*g*) *Howard* v. *Wemsley*, 6 Esp. 53; 4 *ib.* 199; *Rogers* v. *Hull Dock Company*, 34 L. J. Ch. 165.

(*h*) *Morgan* v. *Davies*, 3 C. P. D. 260; see also *Wilkinson* v. *Calvert*, 3 C. P. D. 360.

(*i*) 38 & 39 Vict. c. 92, s. 51; see some of the provisions of this Act stated, *post*, p. 283.

(*k*) See s. 54.

(*l*) *Wilkinson* v. *Calvert*, 3 C. P. D. 360.

(*m*) *Bridges* v. *Potts*, 17 C. B. N. S. 214; 33 L. J. C. P. 338.

(*n*) *Doe* v. *Lea*, 11 East, 312.

(*o*) *Doe* v. *Donovan*, 1 Taunt. 555.

(*p*) *Doe* v. *Grafton*, 18 Q. B. 496; 21 L. J. Q. B. 276.

weeks without reference to the termination of the month. The length of the notice, however, may be varied by local custom and usage, and by the agreement of the parties. When the hiring is for one single quarter, month, or week, no notice at all is requisite (*q*). The term will, in the absence of an express agreement to the contrary, be taken to commence at the time of the tenant's entering and taking possession of the demised premises.

A notice " to quit at the end of the first year of your tenancy which expires half a year after the date of this notice," will be sufficient, and so also will a notice "to quit at the expiration of the current year of your tenancy," provided such notice was given half a year prior to the expiration of the current year of hiring (*r*). Sometimes the notice is given in the alternative, in order to hit one of two periods on which the term is known to end, and it has been held that such a notice is a perfectly good notice, and possesses all the certainty that is reasonably requisite for the information of the tenant (*s*). A notice to a weekly tenant whose tenancy commenced on Wednesday, to quit on Friday provided his tenancy commenced on Friday, or otherwise at the end of his tenancy next after one week from the date thereof, was held to be a good notice to determine the tenancy at the expiration of a week from the subsequent Wednesday (*t*).

Of the application of the notice to the current term of hiring.—If the notice is made to apply to the current term of hiring, and it is given too near the end of the current term to be a good notice for that term, it will not apply to the next term of holding, as that is not the current term, and a fresh notice to quit, therefore, must be given (*u*). The notice is always understood to apply to the year in which it is given, whether it expressly refers to the "current year" or not; and it will not operate as a notice to quit for the succeeding year, unless it appears plainly to have been the intention of the lessor that the notice, if invalid for the first year, should apply to the next year of holding (*x*). Where a notice dated the 27th, and served on the 28th, of September, required a tenant to quit "at Lady Day next, or at the end of your current year," and it appeared that the then current year of hiring ended on Michaelmas Day (the 29th of September), two days after the day of the date, and one day after the service of the notice to quit, it was held that it could not be presumed that the notice was in-

(*q*) *Doe* v. *Bayley*, 5 C. & P. 67; *Doe* v. *Raffan*, 6 Esp. 4; *Doe* v. *Hazell*, 1 Esp. 94; *Kemp* v. *Derrett*, 3 Campb. 511; *Huffell* v. *Armitstead*, 7 C. & P. 56.

(*r*) *Doe* v. *Butler*, 2 Esp. 589.

(*s*) *Doe* v. *Wrightman*, 4 Esp. 6.

(*t*) *Doe* v. *Scott*, 4 Moo. & P. 20.

(*u*) *Doe* v. *Morphett*, 7 Q. B. 577; 14 L. J. Q. B. 345.

(*x*) *Mills* v. *Goff*, 14 M. & W. 75.

tended to apply to the year in which it was given, and of which two days only remained, but that it must be taken to apply to the next year (*y*). So, where the term of hiring commenced and ended on the 2nd of February, and the lessor, on the 22nd of October, 1833, three months and ten days only before the expiration of the year, gave the tenant notice to quit "at the expiration of half a year from the delivery of this notice, or at such other time as your *present* year's holding shall expire after the expiration of half a year from the delivery of this notice," it was held that the notice, though bad for February, 1834, the succeeding February, was a good notice for February, 1835 (*z*).

The commencement of the current year of the tenancy is generally regulated by the commencement of the original holding. Where premises were demised by an agreement dated the "13th of August, 1838," for the term of "one year and six months certain," at a yearly rent payable quarterly, "three calendar months' notice to be given on either side previous to the termination of the tenancy," and the tenant entered and held possession beyond the year and six months, and on the 7th of May, 1840, the lessor gave the tenant notice to quit on the 13th August next, the notice was held to be good, as the year of hiring was to be calculated from that day, and not from the termination of the year and six months (*a*). And, where a tenant entered into possession, under an agreement for a lease for a term of five years and a half, and the lease was never granted, but the tenant continued to occupy, and, when the five years and a half were nearly expired, negociations were entered into for a further lease at an increased rent, to commence on the expiration of the term of five years and a half, and this second lease was never executed, but the defendant continued in the occupation of the premises, paying the increased rent, it was held that the current year of the tenancy must be calculated from the original entry of the tenant upon the premises (*b*). Where, on the other hand, a lessee of a term granted an underlease for fourteen years and a half from the 25th of December, and the term consequently expired on the 24th of June, and the underlessee continued in possession, paying rent, it was held that the subsequent tenancy commenced from the termination of the preceding underlease, and that a notice given on the 24th of December to quit on the 24th of June, was a valid notice (*c*).

(*y*) *Doe* v. *Culliford*, 4 D. & R. 248.
(*z*) *Doe* v. *Smith*, 5 Ad. & E. 353.
(*a*) *Doe* v. *Dobell*, 1 Q. B. 806; *Doe* v. *Samuel*, 5 Esp. 173.
(*b*) *Berrey* v. *Lindley*, 4 Sc. N. R. 61; 3 M. & Gr. 498; and see *Kelly* v. *Patterson*, L. R. 9 C. P. 681.
(*c*) *Doe* v. *Lines*, 11 Q. B. 402; 17 L. J. Q. B. 108; *Waller* v. *Gode*, 6 H. & N. 594; 30 L. J. Ex. 17[illegible].

Calculation of the current year from one of the usual feast days.—The term of hiring is generally, by the express or implied agreement of the parties, calculated from some one or other of the quarterly feasts; and, if the tenant enters in the middle of a customary quarter, and afterwards pays his rent for that half-quarter, and continues then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter-day (*d*). But, if he pays his rent at the end of the quarter or half-year from the time of his coming in, the tenancy will commence from the day of his entry (*e*). If the notice be given to quit at Michaelmas generally, it is good for either Old or New Michaelmas. *Primâ facie* it would be for New Michaelmas; but, if the holding was from Old Michaelmas, this notice would do for that also (*f*). Where a notice was given on the 27th of September, "to quit at the expiration of the term for which you hold," evidence was permitted to be given of a general custom of the country to let from Lady-day, and of the fact of the rent being due at Michaelmas and Lady-day, and it was left to the jury to presume, in the absence of evidence to the contrary, that the tenancy, like other tenancies in that part of the country, was a tenancy from Lady-day to Lady-day (*g*). It has been held that, since the existence of the new style sanctioned by act of parliament, a lease by deed of lands "to be holden from the feast of St. Michael" must be taken to mean New Michaelmas, and that extrinsic evidence is not admissible to show that it meant a holding from Old Michaelmas (*h*). But, although the oral expressions and agreements of the parties are inadmissible to alter or contradict the written contract, yet all the surrounding circumstances may be regarded; and, if it can be shown that the rent has always been paid at Old Michaelmas, or that by the custom of the country lands are always let at Old Michaelmas, the holding would be deemed to be from the latter period (*i*).

Admissions by the tenant of the commencement of the term.—The mere service upon the tenant of a notice to quit at a particular time is not *primâ facie* evidence of the termination of the term at the time mentioned in such notice (*k*). But, if the tenant is expressly told that he must leave after the expiration of six months, or if a written notice is served personally on the lessee, and the latter reads it, and makes no objection to it, this is *primâ*

(*d*) *Doe* v. *Johnson*, 6 Esp. 10; *Doe* v. *Stapleton*, 3 C. & P. 275.

(*e*) *Doe* v. *Matthews*, 11 C. B. 675.

(*f*) *Doe* v. *Perrin*, 9 C. & P. 468; *Doe* v. *Vince*, 2 Campb. 256.

(*g*) *Doe* v. *Lamb*, Adam's Eject., 4th ed. 272.

(*h*) *Doe* v. *Lea*, 11 East, 312; *Smith* v. *Walton*, 1 M. & Sc. 382; 8 Bing. 235.

(*i*) *Furley* v. *Wood*, 1 Esp. 198; *Doe* v. *Benson*, 4 B. & Ald. 589; *Den* v. *Hopkinson*, 3 D. & R. 507.

(*k*) *Doe* v. *Calvert*, 2 Campb. 388.

facie evidence to go to a jury that the time of quitting is correctly stated in the notice. If he cannot read, or does not read the notice in the presence of the person who serves it upon him, it must go for nothing (*l*). An admission by the tenant of a holding corresponding with the time mentioned in the notice may be rebutted by direct evidence of a different holding (*m*). If the period of the commencement of the term is uncertain, and the lessor applies to the lessee to ascertain the time of the commencement of his lease, the lessee is bound by the information he gives, and cannot be permitted afterwards to set up a different holding for the purpose of defeating proceedings that have been taken by the landlord upon the faith of such statement (*n*).

Different periods of entry.—When the demised premises are entered upon at different periods, the notice to quit ought to refer to the time of tenant's entry upon and holding of the principal subject-matter of the demise. Thus, if buildings and land are let together, to be entered upon at different times, or holden from different periods, and the buildings constitute the principal subject-matter of demise, and the land is merely accessorial thereto, the notice to quit should refer to the tenant's entry upon and holding of the buildings, and not the land ; and it is a question of fact which is the principal and which the accessorial subject of demise (*o*). Though part of a farm is to be entered upon and quitted at different periods, *i e.*, the pasture at Old Lady Day, the arable land at Old Candlemas, and the meadow at Old May Day, yet that is a letting from Lady Day to Lady Day; for it is no more than the custom of most counties would have directed without any special words for that purpose in any taking from Old Lady Day, viz, that the arable land shall be entered upon at Candlemas to prepare it for the Lent corn, and the meadows not till May Day, when in the northern counties they are usually heyned for hay (*p*).

Where a tenant entered into possession of a farm, under an agreement "to enter on the tillage land at Candlemas, and on the house and all other the premises on Lady Day following, and to quit the farm according to the times of entry as aforesaid," and the rent was reserved at Michaelmas and Lady Day, it was held that a notice to quit, delivered half a year before Lady Day, but less than half a year before Candlemas, was good, the taking being in substance from Lady Day, with a privilege for the incoming tenant to enter

(*l*) *Thomas* v. *Thomas*, 2 Campb 647; *Doe* v. *Forster*, 13 East, 405, *Doe* v. *Wombwell*, 2 Campb 559.

(*m*) *Oakapple* v *Copous*, 4 T R 361; *Brown* v. *Burtinshaw*, 7 D. & R. 610

(*n*) *Doe* v *Lambly*, 2 Esp 635.

(*o*) *Doe* v. *Howard*, 11 East, 498 ; *Doe* v *Hughes*, 7 M & W. 141; *Doe* v. *Rhodes*, 11 M & W [illegible].

(*p*) *Doe* v. *Snowdon*, [illegible] W. Bl. 1224.

on the arable land at Candlemas for the sake of ploughing, &c. (q). And, where the lessee of a dwelling-house, buildings, and bleaching manufactories, pasture and meadow land, entered into possession under an agreement for a lease, by which it was stipulated that the term of hiring should commence, as to the meadow ground from the 25th of December last, as to the pasture from the 25th of March next, and as to the houses, out-houses, and other buildings, and all the rest of the premises from the 1st of May, and the first half-year's rent was made payable on the day of Pentecost, and the other at Martinmas, it was held that, the substantial subject of demise being the house and buildings for the purpose of the manufacture, the time limited for taking possession thereof was the substantial time of entry, to which a notice to quit ought to refer, and not the 25th of December, the time limited for the taking possession of the meadow land, which was merely auxiliary to the principal subject of demise (r).

Service of notice to quit.—If the notice to quit is served upon the actual occupiers of the demised premises, proof of such service is sufficient to sustain an action of ejectment (s). Where the lessee puts another into possession or occupation of the demised premises, the party so let into possession is presumed to be the assignee of the lessee, and a notice to quit served upon such occupier will determine the term and sustain an ejectment against the lessee. Thus, where the tenant went away leaving his son-in-law in possession, and the lessor gave the son-in-law notice to quit and brought ejectment, and the lessee came forward to defend the possession, saying that he had received no notice, and that his term was not determined, it was held that the notice was sufficient (t). If the party in occupation of the house is the mere servant of the lessee, the notice should be a notice to the lessee to quit, and not a notice to the servant (u). A delivery of the notice to the wife or servant of the lessee, at the dwelling-house of the latter, is a sufficient service (x). But a servant to whom it is delivered should be expressly told that it is a notice to quit, and should be requested, either orally, or by means of a written or printed address or direction, to deliver it to the tenant (y). If there is a personal service of the notice upon the tenant himself, no written direction or address upon the notice is necessary (z);

(q) *Doe* v. *Spence*, 6 East, 120.

(r) *Doe* v. *Watkins*, 7 East. 556.

(s) *Roe* v. *Street*, 2 Ad. & E. 331. As to notice under the Agricultural Holdings Act, see s. 41.

(t) *Doe* v. *Williams*, 6 B. & C. 41; 9 D. & R. 31.

(u) *Doe* v. *Woodman*, 8 East, 228.

(x) *Jones* v. *Marsh*, 4 T. R. 464; *Doe* v. *Dunbar*, 1 M. & M. 11; *Alford* v. *Vickery*, 1 Car. & M. 283; *Tanham* v. *Nicholson*, L. R. 5 H. L. C. 561.

(y) *Doe* v. *Lucas*, 5 Esp. 152: *Smith* v. *Clark*, 9 Dowl. 202.

(z) *Doe* v. *Wrightman*, 4 Esp. 5.

and, if the notice is directed to the tenant by a wrong Christian name and he neglects to repudiate it or send it back, he is deemed to have waived the misdirection and is bound by such notice (*a*). If two or more persons hold possession of the demised premises as joint-tenants or tenants-in-common, notice to one of them is sufficient notice to all to determine the tenancy (*b*).

Service of notice through the post-office.—If a notice to quit properly addressed to the landlord or his authorised agent has been put into the post-office, and is delivered within the usual business hours, on the 25th of March, that will be a good notice for the 29th of December following, although the landlord does not actually receive it until the 26th (*c*).

Acceptance of informal notice—Proof of notice.—If a tenant gives his landlord an insufficient notice to quit, and the landlord at first assents, but ultimately refuses to accept the notice, and the tenant quits according to his notice, the tenancy is not determined (*d*). A written notice to quit may be proved by the production of a copy, although no notice has been given to produce the original (*e*).

Waiver of notice to quit.—If the tenant remains in possession after the expiration of a good and valid notice to quit, his possession then becomes an adverse tenancy and possession, and the landlord may either bring an action of ejectment against him, or proceed in the county court, or before justices of the peace, for the recovery of the possession of the demised premises. But, if he permits the tenant to remain in possession after the expiration of the notice, and demands and accepts rent in respect of the tenant's occupation of the property subsequently to the notice, this amounts to a waiver of the notice (*f*). The same result follows, if the lessor distrains for rent which he claims to be due in respect of the tenant's occupation subsequently to the expiration of the notice (*g*). But, if a banker or agent of the lessor, without any special authority from the latter, receives rent from the tenant, the act of such unauthorised agent does not amount to a waiver of the notice (*h*). The money, moreover, must be paid and accepted as rent, and not by way of satisfaction of the lessor's claim for double rent or double value, under the statutes for holding over. The giving of a second notice to quit before or after the expiration of the first notice does not necessarily amount to a waiver of the latter (*i*). Nor does a collateral promise by the lessor not to act upon the

(*a*) *Doe* v. *Spiller*, 6 Esp. 70.
(*b*) *Doe* v. *Crick*, 5 Esp. 196.
(*c*) *Papillon* v. *Brunton*, 5 H. & N. 518; 29 L. J. Ex. 265.
(*d*) *Bessell* v. *Landesberg*, 7 Q. B. 638.
(*e*) *Doe* v. *Somerton*, 7 Q. B. 58.
(*f*) *Goodright* v. *Cordwent*, 6 T. R. 219; *Doe* v. *Batten*, Cowp. 243; *Blyth* v. *Dennett*, 13 C. B. 178; 22 L. J. C. P. 79.
(*g*) *Zouch* v. *Willingale*, 1 H. Bl. 311.
(*h*) *Doe* v. *Calvert*, 2 Campb. 387.
(*i*) *Doe* v. *Humphreys*, 2 East, 237; *Doe* v. *Steel*, 3 Campb. 116.

notice under certain circumstances, or in the case of the happening of a certain event, amount to a waiver of the notice (*k*). If a tenant retains possession and receives the produce and profits of the demised premises after the expiration of a notice to quit given by him, such retention of possession will, in general, as against the tenant, amount to a waiver of the notice (*l*). A waiver of a notice to quit coupled with a continued occupation after the expiration of the notice creates a new tenancy taking effect at the expiration of the old one (*m*).

Proof and effect of holding over.—There is no holding over by a tenant from the mere fact of his not sending the keys of a house to the landlord. It is enough if the tenant vacates the house and gives the landlord the means and opportunity of taking possession when he pleases; for possession is to be given on the land, and the landlord must come and take it. But, if the tenant continues to use and occupy the premises after the term has ceased, he will be responsible for holding over. And the tenant is responsible, if his sub-tenant holds over; for the landlord is entitled, upon the determination of the tenancy, to receive full and complete possession from the tenant (*n*). But one joint-tenant is not responsible for a holding over by the other (*o*). Mere holding over does not create a new tenancy; nor is it in itself any evidence of an agreement to renew the previous tenancy (*p*). There must be a payment and acceptance of rent which accrued subsequently to the expiration of the lease; and then the tenant holds as tenant from year to year upon all such of the terms of the original lease as are applicable to a yearly tenancy (*q*). If, therefore, the lease contained a proviso for re-entry in case of non-payment of rent, the proviso is impliedly annexed to the yearly tenancy (*r*). But, if there is any evidence to show that the holding after the expiration of the lease was upon new and different terms, the legal presumption is rebutted (*s*), and the nature of the holding becomes a question of fact. Whether any particular covenant is applicable to a yearly tenancy is in some cases a question of fact (*t*). In other cases it will be a question of law. When a demise is determined

(*k*) *Whiteacre* v. *Symonds*, 10 East 13.
(*l*) *Jones* v. *Shears*, 4 Ad. & E. 832.
(*m*) *Tayleur* v. *Wildin*, L. R. 3 Ex. 203; 37 L. J. Ex. 173; see *Holme* v. *Brunskill*, 3 Q. B. D. 495.
(*n*) *Henderson* v. *Squire*, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73; *Caldecott* v. *Smythies*, 7 C. & P. 808.
(*o*) *Tancred* v. *Christy*, 12 M. & W. 316.
(*p*) *Gray* v. *Bompas*, 11 C. B. N. S. 520; *Jenner* v. *Clegg*, 1 Mood. & Rob. 213.
(*q*) *Torriano* v. *Young*, 6 C. & P. 11; *Thomas* v. *Packer*, 1 H. & N. 671; *Bishop* v. *Howard*, 3 D. & R. 298; *Buckworth* v. *Simpson*, 1 C. M. & R. 843; *Arden* v. *Sullivan*, 14 Q. B. 839; 19 L. J. Q. B. 271; *Beale* v. *Sanders*, 3 Bing. N. C. 850.
(*r*) Williams, J., *Doe* v. *Amey*, 12 Ad. & E. 480; *Hutton* v. *Warren*, 1 M. & W. 466.
(*s*) *Mayor of Thetford* v. *Tyler*, 8 Q. B. 95.
(*t*) *Hyatt* v. *Griffiths*, 17 Q. B. 505; *Oakley* v. *Monck*, L. R. 1 Ex. 195; 35 L. J. Ex. 87.

by the expiration of the landlord's estate, and the tenant continues to hold under the remainder-man paying the same rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise, is a question of fact. If such a tenant continues to hold under the remainder-man, and nothing passes between them except the payment and receipt of rent, the new landlord is not bound by a stipulation contained in the former tenancy, which is not known to him in fact, and is not according to the custom of the country (*u*).

Double yearly value for holding over.—Any tenant wilfully holding over and retaining possession of the demised premises after the determination of his term, and after possession has been demanded and notice in writing has been given him by the lessor, is liable to pay to the person kept out of possession double the yearly value of the lands, &c., detained (*v*). An action for the recovery of this penalty may be brought by the landlord, and the landlord alone, either before or after he has recovered possession of the land by an action of ejectment (*x*). But it has been held that the Act applies only to the case of a wilful and contumacious holding over by the tenant after a valid notice to quit, and not to a holding over under a *bonâ fide* claim of title or right, though erroneous (*y*). If at the time of her marriage a woman is tenant of certain premises, and has received notice to quit, the husband after the marriage incurs the obligation of giving up possession of the premises, and may render himself liable to an action for double value for holding over; for if the wife incurs the penalty the husband will have to pay it, and he cannot get rid of the obligation by pleading ignorance (for it is his duty to make inquiry), nor by showing that his wife deceived him, or concealed the notice to quit (*z*). A weekly or quarterly tenant has been held not to come within the operation of the statute (*a*). In the case of a tenancy from year to year, the ordinary notice to quit at the end of the current year of hiring is a sufficient demand of possession to entitle the lessor to double yearly value (*b*). If the tenant holds under a lease for a term of years certain, a notice to quit at the expiration of such term is likewise a sufficient demand of possession, and such notice may be given previous to the expiration

(*u*) *Oakley* v. *Monck*, L. R. 1 Ex. 159; 35 L. J. Ex. 87.

(*v*) 4 Geo. 2, c. 28, s. 1; as to the computation of the yearly value, see *Robinson* v. *Learoyd*, 7 M. & W. 48.

(*x*) *Soulsby* v. *Neving*, 9 East, 310; *Harcourt* v. *Wyman*, 3 Exch. 817; *Swinfen* v. *Bacon*, 6 H. & N. 846; 30 L. J. Ex. 37.

(*y*) *Hirst* v. *Horn*, 6 M. & W. 395; *Page* v. *More*, 15 Q. B. 684; *Swinfen* v. *Bacon*, *supra*.

(*z*) *Lake* v. *Smith*, 1 B. & P. N. R. 179.

(*a*) *Lloyd* v. *Rosbee*, 2 Campb. 454; *Sullivan* v. *Bishop*, 2 C. & P. 359.

(*b*) *Wilkinson* v. *Colley*, 5 Burr. 2698; *Poole* v. *Warren*, 8 Ad. & E. 582; *Lake* v. *Smith*, 4 B. & P 179.

of such term, or at any time afterwards, so long as the tenant continues to hold as a tenant-at-will (*c*). If the landlord has done any act amounting to a waiver of his notice to quit, he cannot make such notice the foundation of an action for double value (*d*).

Double rent for holding over.—By the 11 Geo. 2, c. 19, s. 18, it is enacted that, if any tenant gives notice to the lessor of his intention to quit at a particular time, and does not deliver up possession of the premises at the time mentioned, such tenant, his executors, &c., shall from thenceforth pay to the landlord or lessor double the rent which he would otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent. The tenant's notice to quit need not be in writing in order to support the lessor's claim to double rent, nor need the lease which the tenant has determined by his notice to quit be a lease in writing (*e*). But the notice must be a good notice to quit at some fixed time, and at a period when the tenant is able by notice to put an end to the tenancy. If the tenant merely gives notice that he will quit "as soon as he can possibly get another location" (*f*), or gives notice to quit in the middle instead of at the termination of the current term of hiring, or a notice of too short a duration, and which does not therefore bind the lessor, the lease is not determined, and there cannot, consequently, be any holding over by the tenant (*g*). A tenant who holds over for one year after notice to quit, paying double rent, may quit at the end of such year without fresh notice (*h*).

Determination of tenancies by railway notices.—If lands holden by tenants from year to year are required by railway companies for the making of a railway, the company may, in general, under the powers of their Act, either give the ordinary landlord's notice to quit ending with the current year of the tenancy, in which case no compensation would be payable in respect of any unexpired term, or six months' notice to be given at any time, in which case the tenant will be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. If, after having given a notice not ending with the expiration of the current year, the company inform the tenant that he may hold on till the end of the current year, and he does so, the situation of the parties is the same as if

(*c*) *Cutting* v. *Derby*, 2 W. Bl. 1075; *Messenger* v. *Armstrong*, 1 T. R. 53.

(*d*) *Ryal* v. *Rich*, 10 East, 47.

(*e*) *Timmins* v. *Rowlinson*, 3 Burr. 1608.

(*f*) *Farrance* v. *Elkington*, 2 Campb. 592.

(*g*) *Johnstone* v. *Huddlestone*, 4 B. & C. 922.

(*h*) *Booth* v. *Macfarlane*, 1 B. & Ad. 904.

a regular landlord's notice had been originally given (i). If the tenant continues in possession after the expiration of the notice he holds simply as a tenant-at-sufferance, without any estate or interest at all in the premises, unless rent is received from him, or the premises are re-demised to him (k).

Recovery of possession.—Possession of land cannot be gained by an act of trespass which has never been acquiesced in by the landowner. Every person who trespasses upon another man's land and remains there tortiously may be expelled by main force (l). But if he has once gained a lawful possession which is determined, and he then continues unlawfully to hold the land, the landowner is punishable for a forcible entry, if he enters with a strong hand to dispossess him (m). The tenant cannot maintain an action for damages against the landlord for a trespass upon the realty in respect of the forcible entry; for there is no trespass by the latter in entering on property which is his own, and on which he has a legal right to enter. Therefore, if the tenant of a dwelling-house holds over wrongfully, and the landlord enters and pulls down the house, or stops up the chimney, or takes off the roof, and the tenant brings an action against the landlord for trespassing on the land, it is an answer that the house was the defendant's house, and therefore that he entered and pulled it down, &c. (n). It has been laid down by Parke, B., that, "where a breach of the peace is committed by a freeholder who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party," and that "it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, though in so doing a breach of the peace was committed" (o). Tindal, C.J., is reported to have said that, "if the landlord in making his entry upon the tenant has been guilty either of a breach of a positive statute or of an offence against the common law, such violation of the law in making the entry causes the possession thereby obtained to be illegal" (p). But this has since been decided not to be law; and it is now well established that at the determination of the term the landlord may enter and take possession of the demised premises, and, after civilly request-

(i) *Reg.* v. *Lond. & Southamp. Ry. Co.*, 10 Ad. & E. 3.

(k) *Ex parte Nadin*, 17 L. J. Ch. 421.

(l) *Browne* v. *Dawson*, 12 Ad. & E. 629.

(m) *Rex* v. *Bathurst*, Say, 227; *Rex* v. *Wilson*, 8. T. R. 361.

(n) *Burling* v. *Read*, 11 Q. B. 904; *Davison* v. *Wilson*, 17 L. J. Q. B. 196.

(o) *Harvey* v. *Bridges*, 14 M. & W. 442.

(p) *Newton* v. *Harland*, 1 Sc. N. R. 490.

ing the tenant to depart, may, in case of his refusal, gently lay hands upon him and turn him out, subject only to the liability to be indicted for a forcible entry (q). If the landlord has no right to enter, and he takes advantage of the temporary absence of the tenant to fasten up the door of his apartments and exclude him from re-entering, the tenant may recover damages against the landlord for breaking and entering, although the landlord has never actually entered the rooms (r).

Licence to eject.—Where it was provided that, in case of non-payment of rent or non-performance of covenants, it should be lawful for the lessor and his agents immediately to enter upon and take possession of the demised premises, and to expel the lessee and all persons claiming under him, without any legal process, as effectually as any sheriff might do in case the lessor had obtained judgment in ejectment for the recovery of possession and a writ had issued thereon to the sheriff in due form of law, and that the leave and licence of the lessee might be pleaded in any action brought by the latter for such entry and ouster, and the agreement be used as conclusive evidence of such leave and licence; it was held that the lessor had a right, as between himself and the lessee, under this agreement, to eject the lessee by main force, and might plead such licence in bar of an action of trespass brought by the latter (s).

Ejectment under provisos for re-entry.—When the lessor has a right to re-enter in case of non-payment of rent, and brings an action of ejectment, he must show that demand was made of the rent upon the demised premises, unless there is no one there on whom demand can be made, and the demand has been made on the party liable to pay (t), and that the same or some part thereof has not been paid (u), unless the proviso is for re-entry without any demand of the rent (x) The demand must be of the precise sum due, and must be made on the day when the rent was due and payable by the terms of the lease, and at a convenient time (which ought to be an hour) before sunset (y). Where the proviso is for re-entry in case of non-payment of rent for the space of ten, fifteen, or any other number of days after it has become due, the demand must be made on the tenth or last day (z). Where rent was payable quarterly, and two quarters were in arrear and

(q) *Davis* v *Burrell*, 10 C B 822; *Harvey* v. *Bridges*, 14 M. & W 437, 1 Exch. 261; *Jones* v *Chapman*, 2 Exch. 803, 821; *Pollen* v *Brewer*, 7 C B N. S 371.

(r) *Lane* v *Dixon*, 3 C. B 776

(s) *Kavanagh* v. *Gudge*, 7 Sc N. R 1025; 7 M & Gr. 316.

(t) *Manser* v. *Dix*, 8 De G. M. & G. 703

(u) Bro. Abr. DEMANDE, 19; *Kidwelly* v. *Brand*, Plowd. 70, a, b.

(x) *Doe* v *Masters*, 2 B & C. 490.

(y) *Fabian's case*, Cro Eliz. 209; Co. Litt. 202, a.; 1 Saund 287, n. 16; *Doe* v *Brydges*, 2 D. & R. 29; *Acocks* v. *Phillips*, 5 H. & N. 183.

(z) *Hill* v. *Grange*, Plowd. 172, a, 173;

were demanded together, it was held that the lessor could not avail himself of the proviso for re-entry in case of non-payment for twenty-one days, as the first quarter ought to have been demanded on the twenty-first day after it had become due (*a*).

Where there is no sufficient distress and one half year's rent is due and in arrear, and the lessor has a right to re-enter for non-payment thereof, proceedings may be taken under the 15 & 16 Vict. c. 76, s. 210 (*b*). The operation of the statute appears to be confined to cases where the tenant was six months in arrear at the very time when the landlord had recourse to the statutory remedy." If the landlord distrains for the rent due, he waives any breach of the condition of re-entry which had accrued prior to the taking of the distress (*c*). Proof of no sufficient distress at the time the right to re-enter accrued is *primâ facie* proof of there being no sufficient distress at the time of the service of process (*d*). If more than half a year's rent is in arrear, the case is within the statute (*e*); but, if more than half-a-year's rent is due, and there is sufficient distress on the premises to satisfy one half-year, the landlord cannot proceed under the statute, but must make his demand and entry at common law (*f*). But the distress must be available; and, therefore, if the tenant locks up the premises, so that the landlord cannot get at the goods which may happen to be upon them, he may proceed under the statute (*g*). The right of re-entry must be absolute and unqualified. If he has a right only to re-enter and hold until arrears of rent are satisfied, and not to avoid the lease altogether, he cannot avail himself of the statute (*h*). The tenant or his assignee or sub-lessee (*i*) may, at any time before trial (s. 212), stay all further proceedings by paying or tendering to the lessor, or bringing into court, the rent and arrears with costs (*k*).

Recovery of possession, where the demised premises are deserted.—The 11 Geo. 2, c. 19, s. 16, and the 57 Geo. 3, c. 52, give a summary remedy by proceedings before justices for recovery of demised premises, when the tenant has deserted them, and left them uncultivated or unoccupied, so that no sufficient distress can be had. And by the 3 & 4 Vict. c. 84, police magistrates and police constables within the metropolitan police district are enabled to put the lessor into possession, and determine the lease. But this power is not by any of the provisions of the last-named sta-

Clun's case, 10 Co. 129, a.; *Wood and Chiver*, 4 Leon. 180; *Doe* v. *Wandlass*, 7 T. R. 117.

(*a*) *Doe* v. *Paul*, 3 C. & P. 613. As to recovery of possession by landlord of a company being wound up, see *General Share Co.* v. *Wetly Brick Co.*, 20 Ch. D. 260.

(*b*) *Doe* v. *Franks*, 2 C. & K. 678.

(*c*) *Cotesworth* v *Spokes*, 30 L.J.C.P. 222.

(*d*) *Doe* v. *Fuchau*, 15 East, 286.

(*e*) *Doe* v. *Alexander*, 2 M. & S. 525.

(*f*) *Doe* v. *Roe*, 9 Dowl. 548.

(*g*) *Doe* v. *Dyson*, M. & M. 77.

(*h*) *Doe* v. *Bowditch*, 8 Q. B. 973.

(*i*) *Doe* v. *Byron*, 1 C. B. 623.

(*k*) *Roe* v. *Davis*, 7 East, 363.

tute, or by the 11 & 12 Vict. c. 43, s. 34, vested in the Lord Mayor or alderman sitting in the justice room at the Mansion House or Guildhall (*l*). The record of the proceedings need not show that any complaint or inquiry was made before the justices upon oath, nor state that the landlord had a right of re-entry (*m*). Where a bankrupt lessee of a dwelling-house went away, leaving a person in the house whose possession was merely colourable, it was held that the justices were warranted in finding that the lessee had deserted the premises (*n*). But, where the tenant left his wife and children in the house, but took away his furniture and went away himself, it was held that there was no desertion; and the judges of assize, on appeal, ordered restitution of the demised premises with costs (*o*). Where the justices go the first time and find the premises deserted, then, unless some one appears and pays the rent, when they go the second time they are to deliver possession to the lessor. The proceedings of the justices are examinable in a summary way by the judges (s. 17).

Recovery of possession of houses and small tenements.—The statute 1 & 2 Vict. c. 74, enables justices of the peace to give possession to the landlord of houses and land held for a term not exceeding seven years, rent free or at a rent not exceeding 20*l.* per annum, upon which no fine is payable, provided the tenancy has been duly determined, and notice has been given as therein provided (*p*). If under this statute a tenancy is proved before the justices, and a determination of that tenancy, and a refusal on the part of the tenant to quit, it is not competent to the tenant to set up the title of any third party, or raise any question of title before the magistrate (*q*). If the term or interest of the tenant in any house, land, or corporeal hereditament, where the value of the premises or the rent does not exceed 50*l.* by the year (*r*), and on which no fine has been paid, has been duly determined, and the tenant or (if he does not occupy or only occupies part) any person by whom the premises or part of them are then actually occupied, neglects or refuses to deliver up possession, the landlord or his agent may, by proper proceedings in the county court, obtain a warrant of possession (*s*). The plaint must be brought in the district where the tenements are situate; and the court will have jurisdiction, even though a *bonâ fide* question of title is raised,

(*l*) *Edwards* v. *Hodges*, 15 C. B. 477.
(*m*) *Basten* v. *Carew*, 5 D. & R. 558.
(*n*) *Ex parte Pilton*, 1 B. & Ald. 369.
(*o*) *Ashcroft* v. *Bourne*, 3 B. & Ad. 684.
(*p*) *Delaney* v. *Fox*, 1 C. B. N. S. 166.
(*q*) *Rees* v. *Davies*, 4 C. B. N. S. 62.
(*r*) If the rent does not exceed 50*l.* the County Court has jurisdiction, though the premises are of greater annual value; *Harrington, Earl of* v. *Ramsey*, 8 Exch. 881; 2 E. & B. 669; 22 L. J. Q. B. 460.
(*s*) 19 & 20 Vict. c. 108, s. 50.

where neither the annual value of the lands nor the rent payable in respect thereof exceed 20*l.* (*t*). If, however, the annual value or rent exceed that sum, the jurisdiction of the court will be ousted if a *bonâ fide* question of title is raised; and, even if neither rent nor value exceed 20*l.*, yet the defendant may have the action tried in a superior court if he can satisfy a judge that the title to lands of greater annual value than 20*l.* will be affected by the decision (*u*). A tenant is, in general, estopped from disputing his landlord's title; but he may show that it has expired; and, if there is some evidence to support the defence, and it is not a mere illusory claim, and the rent or annual value of the premises exceed 20*l.*, the judge of the county court should refrain from trying the question (*x*).

Where on the hearing of a plaint it appeared that one of the matters seriously in dispute was whether the whole or part of a house had been demised, it was held that the inquiry involved a question of title, and that the county court had no jurisdiction in the matter (*y*). A decision of a county court judge, that the title is not in question, is by no means conclusive of the fact. The question may be brought before the superior courts on motion for a prohibition by affidavit; and, if the court directs that the party should declare, the question becomes one of evidence (*z*). Neither the tenant nor any one claiming through him, nor any one put into possession by him, can, during the demise, controvert the landlord's title in an action of ejectment; but he may show that the title has expired (*a*). If a tenancy is sought to be established through the medium of payment of rent to the plaintiff or to his agent, it must be shown that the rent was either paid by the defendant himself, or by some person through whom he claims, or by his authorised agent; for an unauthorised payment of rent by a stranger will not be binding on the defendant, or in any way affect his rights. Where a party distrained for rent, and the lessee paid the rent due under the distress without protest or objection, it was held that he could not after that controvert the title of the plaintiff (*b*).

Rights of outgoing and incoming tenants — Away-going crops, allowances for tillage, manures, &c.—The rights of tenants to way-going crops, tillages, and value of improvements, &c., have been defined and extended in some measure by the Agricultural

(*t*) 30 & 31 Vict. c. 142, s. 12.

(*u*) 30 & 31 Vict. c. 142, s. 13.

(*x*) *Mountnoy* v. *Collier*, 1 E. & B. 630; 22 L. J. Q. B. 126; *Marsh* v. *Dewes*, 17 Jur. 558; *Kerkin* v. *Kerkin*, 3 E. & B. 399; *Latham* v. *Spedding*, 17 Q. B. 440.

(*y*) *Chew* v. *Holroyd*, 8 Exch. 249; 22 L. J. Ex. 95.

(*z*) *Thompson* v. *Ingham*, 14 Q. B. 710.

(*a*) *Ante*, p. 213; *Doe* v. *Smythe*, 4 M. & S. 347; *Doe* v. *Mills*, 3 Ad. & E. 20; *Doe* v. *Baytup* 3 *ib.* 190.

(*b*) *Doe* v. *Mitchell*, 3 Moore, 229; *Hitchens* v. *Thompson*, 5 Exch. 50.

Holdings Act, 1875, but the Act is only permissive (*c*), and neither landlords nor tenants appear to have been eager to avail themselves of its provisions. Compensation is to be given to tenants for improvements of different sorts (*d*), according to the length of time since they were made (*e*), and according to a certain scale (*f*), after proper notices (*g*), and subject to certain restrictions and deductions (*h*). The landlord paying compensation may obtain a charge upon the holding (*i*).

All tenants who held by an uncertain tenure, and whose interest might at any time be determined by the will of the lord, were by the common law entitled to emblements and the crops and annual produce of the soil which had been sown or planted by them, and which had not come to maturity at the period of the determination of their interest (*k*). In all farming leases, the custom of the country, with respect to the mode of cultivation and the right to the away-going crop, is impliedly annexed to the terms of the lease, unless it is excluded by express provisions and stipulations (*l*). The general rule in the case of farm leases is that the tenant is bound to leave the land, when he quits, in the same state as he found it on taking possession. If he has taken the farm under a custom by which the outgoing tenant is bound to leave a certain quantity of clover and grass seeds or fallows, or a certain number of acres of growing wheat, or turnips, or other produce, or a certain quantity of hay and straw, or manure, on the demised premises, he must in his turn, when he quits the land, leave it in the same state and condition, and with the same privileges and advantages for the benefit of his successor, that he himself enjoyed when he entered upon it.

By the custom of some counties, the outgoing tenant takes two-thirds of particular crops, leaving one-third to the incoming tenant (*m*). In some districts, all the hay and straw must be left to be consumed on the farm; whilst in others, the tenant is entitled to take it away with him. Sometimes the landlord or the incoming tenant has a right, and in some instances he is bound by custom, to take the away-going crops, and also the straw and hay, and sometimes the manure, from the outgoing tenant at a valuation; and, when such a custom exists, the tenant has a right, after the expiration of his lease, and after he has quitted the premises, to enter upon the land as occasion may require to

(*c*) Ss. 54, 55, 56, 57; also the Act only applies to holdings which are agricultural or pastoral, and which are not less than two acres, s. 58.

(*d*) S. 5.

(*e*) S. 6.

(*f*) Ss. 7, 8, 9.

(*g*) Ss. 10, 12.

(*h*) Ss. 11, 13, 14, 15, 16, 17, 18, 19.

(*i*) Ss. 42-44.

(*k*) Litt. ss. 68, 69.

(*l*) *Wigglesworth* v. *Dallison*, 1 Doug. 201; 1 Smith's L. C. 5th ed. 520.

(*m*) *Holding* v. *Pigott*, 5 Moo. & P. 427; *Griffiths* v. *Tombs*, 7 C. & P. 810; as to the customs in different counties, see Wood. L. & T. 11th ed. by Lely, p. 721.

improve and tend the crop. If the landlord or the incoming tenant does not take the crop at a valuation, the tenant has impliedly accorded to him, by general custom and usage, all such rights and privileges as are necessary to enable him to gather it in, and secure it, and sell or turn it to profit and advantage when arrived at maturity, such as free ingress and egress into and from the demised premises, the temporary use of the barns to thrash it out, and yard-room for the straw; and he has a right, moreover, to the possession of the field for a reasonable time for the carrying away as well as the cutting of his corn (*n*). If no custom exists giving the tenant a right to the away-going crop, the landlord is entitled thereto. The tenant, therefore, must in all cases make out and establish the custom (*o*). When no such custom exists, the natural consequence is that the tenant does not till or sow the ground at the close of his term of hiring; and a custom therefore appears to prevail, in all places where the outgoing tenant is not entitled to the away-going crop, for the incoming tenant or the landlord to enter to manure and till the land, and plant the spring corn, and prepare for the harvest, prior to the termination of the lease and the commencement of his own term and interest (*p*).

Whatever custom regulates the tenants rights on entering, the same custom regulates his rights on leaving; and the custom may be given in evidence, although there is a lease under seal, or a written contract of demise between the parties. All customary allowances also, as between the outgoing tenant and the landlord or incoming tenant, are impliedly annexed to the express terms of the lease, such as allowances for expenses incurred in draining lands that required draining according to good husbandry, though the drainage was done without the landlord's knowledge or consent (*q*); also for manuring, tilling, fallowing, half-fallowing, and sowing the land, for seeds, and labour, foldage, and manure (*r*). The tenant's rights to growing crops and produce are in all cases strictly confined to annual crops, or the first year's produce of seeds and roots sown or planted by him during the last year of his tenancy, and do not extend to trees, shrubs, and plants of a perennial character (excepting the fruit-trees, plants, and shrubs of seedsmen and nursery gardeners, an exception introduced for the

(*n*) *Boraston* v. *Green*, 16 East, 81; *Beaty* v. *Gibbons*, *ib.* 118; *Strickland* v. *Maxwell*, 2 Cr. & M. 539; *Griffiths* v. *Puleston*, 13 M. & W. 358; as to the right of the grantee of growing crops after the landlord has resumed possession, see *Hayling* v. *Okey*, 8 Exch. 545.

(*o*) *Caldecott* v. *Smythies*, 7 C. & P. 808.

(*p*) Kennedy & Granger, on Tenancy Customs

(*q*) *Mousley* v. *Ludlam*, 21 L. J Q. B. 64.

(*r*) *Dalby* v. *Hirst*, 3 Moore, 536; *Hutton* v. *Warren*, 1 M. & W. 477; *Wilkins* v. *Wood*, 12 Jur. Q. B 583; *Faviell* v. *Gaskoin*, 7 Exch. 273.

benefit of trade) (*s*). Thus a border of box, planted by a tenant in a garden demised to him, cannot be taken up and removed at the expiration of his term (*t*), nor a strawberry bed (*u*), nor hedges, nor fruit-trees (*v*).

The person primarily liable to the outgoing tenant is the landlord (*x*), who, on the other hand, is entitled to be allowed the amount of rent due to him. But it constantly happens that the incoming tenant, who in the end, by his bargain with the landlord, is to take and pay for the tillages, in order to avoid circuity and the trouble and expense of two valuations, agrees with the outgoing tenant, that the valuation shall be made directly from the latter to him. That, however, does not rest upon the custom, but is a mere conventional arrangement without which there would be no privity between the outgoing and the incoming tenant. There is, generally speaking, no formal agreement, but each appoints a valuer, and the valuers settle the amount to be paid; and in that case there is an implied contract that if rent is due from the outgoing tenant to the landlord, and such rent is paid by the incoming tenant, it may be set off against the value of the tillages (*z*).

Where the lease determines by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, the tenant, instead of claims to emblements, may continue to hold the farm or lands until the expiration of the then current year of his tenancy (*a*); and the succeeding landlord is entitled to receive of the tenant the proper proportion of the rent for the period which may have elapsed from the lessor's death or cesser of the estate of such lessor to the time of the tenant's quitting, and may distrain for such proportion (*aa*).

Sale of straw off the land.—If by the terms of the lease the hay and straw are to be consumed by the tenant on the land, and the lessee sells the crop, and the purchaser removes it, the landlord may maintain an action against the purchaser for the value of the hay or straw, &c., so removed (*b*). It is no answer to such an action to show that the tenant has brought back an equivalent in the shape of manure (*c*). If the value of straw sold off is to be returned in manure, the manure value and not the market price of the straw sold would seem to be the proper criterion of expendi-

(*s*) *Wardell* v. *Usher*, 3 Sc. N. R. 508.
(*t*) *Empson* v. *Soden*, 4 B. & Ad. 655.
(*u*) *Watherell* v. *Howells*, 1 Campb. 227.
(*v*) *Wyndham* v. *Way*, 4 Taunt. 316.
(*x*) *Bradbury* v. *Foley*, 3 C. P. D. 129
(*z*) *Stafford* v. *Gardner*, L. R. 7 C. P. 242.
(*a*) 14 & 15 Vict. c. 25, s. 1; if there are from the nature of the case no claims to emblements, the section will not apply; *Haines* v. *Welch*, *infra*.
(*aa*) *Haines* v. *Welch*, L. R. 4 C. P. 91; 38 L. J. C. P. 118.
(*b*) 56 Geo. 3, c. 50, s. 11; repealed as to assignee of insolvent debtor, see St. L. R. Act, 1873; *Wilmot* v. *Rose*, 3 E. & B. 563; 23 L. J. Q. B. 281; see *Hawkins* v. *Walrond*, 1 C. P. D. 280.
(*c*) *Legh* v. *Lillie*, 6 H. & N. 171; 30 L. J. Ex. 25.

ture upon the land (*d*). According to the custom of the country in some districts, the incoming tenant, in the absence of a special agreement, pays the outgoing tenant a consuming price, or two-thirds the market price for the straw; but, if the outgoing tenant is bound to consume all the manure on the farm, the allowance in respect of straw, as between him and the incoming tenant, would be only half the market price, called a fodder price. And, where there is no special agreement to the contrary, the tenant is often by custom entitled to go out as he came in (*e*). An outgoing tenant, therefore, who on coming in has paid for straw in accordance with the custom, is entitled to be paid for straw on going out; and a stipulation in a lease binding the tenant "to consume with stock on the farm all the hay, straw, and clover grown thereon, which manure shall be used on the said farm," is in nowise inconsistent with the tenant's customary right to receive payment for the unconsumed straw on his going out (*f*).

Removal of superstructures and fixtures.—Buildings and constructions of a permanent character, erected upon the demised premises by the tenant and attached to the freehold, are irremovable by him at common law, unless they have been erected for trading purposes; but by the 14 & 15 Vict. c. 25, s. 3, provision is made for the removal of farm-buildings, and buildings, engines, or machinery, erected by the tenant with the consent in writing of the landlord, either for agricultural purposes, or for the purposes of trade and agriculture.

By the Agricultural Holdings Act, 1875 (*g*), engines, machinery, and fixtures affixed by the tenant, after notice and without objection, for which he is not entitled to compensation, and not affixed in pursuance of some obligation or instead of some fixture belonging to the landlord, are the property of the tenant and removable by him, after performing all obligations and giving a month's notice to the landlord, and not doing any avoidable damage, and making good what is done. The landlord may elect to purchase any fixture at a fair value to the incoming tenant.

Trade and tenant's fixtures are things which are annexed to the land for the purpose of trade or of domestic convenience or ornament, in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration (*h*).

(*d*) *Lowndes* v. *Fountain*, 11 Exch. 491.

(*e*) *Clarke* v. *Westrope*, 18 C. B. 774; 25 L. J. C. P. 287.

(*f*) *Muncey* v. *Dennis*, 1 H. & N. 220.

(*g*) 38 & 39 Vict. c. 92, s. 53; but see as to this Act the provisions stated, *ante*, p. 283.

(*h*) *Climie* v. *Wood*, L. R. Ex. 328; 38 L. J. Ex. 223.

Abandonment of the right of removal.—A covenant in a lease to yield up the demised premises, together with all fixtures thereunto belonging, is confined to fixtures which belonged to the demised premises at the time of the execution of the lease; but a covenant to yield up fixtures that may belong to the demised premises extends to fixtures that are afterwards put up by the tenant (*i*). Whenever the tenant has a right of removal, he must exercise such right prior to the determination of his tenancy; he cannot, after he has once quitted the demised premises, re-enter for the purpose of severing and removing fixtures (*k*). If the tenant holds over wrongfully, he loses his right to sever and remove fixtures (*l*); but, if a lease becomes forfeited, the tenant may, before the landlord re-enters or before the forfeiture is established by the judgment of a court of law, but not afterwards (*m*), remove his fixtures, and cannot, it seems, be made responsible for so doing (*n*). If the landlord gives the lessee permission to leave the fixtures on the premises, and make the best terms he can for them with the incoming tenant, and the latter enters and takes possession of the fixtures, but refuses to pay for them, the lessee cannot enter to remove them, nor can he recover the value of them (*o*). When it is provided by the terms of a lease that the lessee, at the expiration or other sooner determination of the term, is to have certain fixtures, and the lease becomes forfeited, the lessee has a reasonable time from the date of the forfeiture for the removal of his fixtures (*p*).

Right of a purchaser or mortgagee to enter and remove fixtures after a surrender of the term.—If a lessee, possessed of tenant's fixtures removable at the expiration of his term, assigns them to a purchaser, and afterwards surrenders his lease, the purchaser has a right to enter and sever the fixtures, notwithstanding that the lessee himself would have forfeited his right to remove them; for an estate surrendered hath, in consideration of law, a continuance, having regard to strangers who were not parties or privies to the surrender, "lest, by a voluntary surrender, they may receive prejudice touching any right or interest they had before the surrender" (*q*). Where, therefore, a lessee mortgaged his

(*i*) *Hitchman* v. *Walton*, 4 M. & W. 414; *Naylor* v. *Collinge*, 1 Taunt. 19; *Thresher* v. *E. L. Water Co.*, 2 B. & C. 608; 4 D. & R. 62; *Martyr* v. *Bradley*, 2 M. & C. 25; 9 Bing. 24; *West* v. *Blakeway*, 3 Sc. N. R. 218.

(*k*) *Lee* v. *Risdon*, 7 Taunt. 191, *Quincy*, *ex parte*, 1 Atk. 477; *Dudley* v. *Warde*, Amb. 113; *Lyde* v. *Russell*, 1 B. & Ad. 394.

(*l*) *Leader* v. *Homewood*, 27 L. J. C. P. 316.

(*m*) *Heap* v. *Barton*, 12 C. B. 274; *Pugh* v. *Arton*, L. R. 8 Eq. 626, 38 L. J. Ch. 619.

(*n*) *Stansfeld* v. *Mayor of Portsmouth*, 4 C. B. N. S. 131; 27 L. J. C. P. 124; *Storer* v. *Hunter*, 3 B. & C. 368.

(*o*) *Roffey* v. *Henderson*, 17 Q. B. 574; 21 L. J. Q. B. 49.

(*p*) *Stansfeld* v. *Mayor, &c., of Portsmouth*, 4 C. B. N. S. 133; 27 L. J. C. P. 124.

(*q*) Co. Litt. 338, b.

severable tenants' and trade fixtures, and then surrendered his lease to the lessor, who granted a fresh term to the defendant, it was held that the mortgagees had a right to enter and sever the fixtures, and that they might maintain an action against the lessor for preventing them from exercising their right to sever, and in such action were entitled to recover the value of the fixtures as severed (*r*).

Non-payment of tithe rent-charge by an outgoing tenant.—If any occupying tenant quits leaving unpaid any tithe rent-charge (14 & 15 Vict. c. 25, s. 4), and the tithe owner gives notice of proceeding by distress for its recovery, the landlord or succeeding tenant may pay the tithe rent and any expenses incident thereto, and may recover the amount from the outgoing tenant or his legal representatives, in the same manner as if the same were a debt by simple contract due to the landlord or tenant making such payment.

Inclosures of waste land by tenants.—If the tenant during the demise has inclosed land from the adjoining waste, and used it in common with the demised premises, the title of the lessor will, as between him and the lessee, prevail over the whole whether the tenant made the inclosure with or without the assent of the lessor (*s*); and, in either case, the Statute of Limitations will not begin to run against the lessor until the termination of the lease (*t*).

A short form of lease has been provided by the 8 & 9 Vict. c. 124.

Leases obtained by misrepresentation.—An estate or interest in land once vested cannot afterwards be divested in a court of law, on the ground that the deed creating the estate has been obtained by a fraudulent misrepresentation respecting some matter collateral to the contract. Where, therefore, a lessor has been induced to execute a lease by reason of a fraudulent representation on the part of the lessee as to the use to which he intended to apply the premises, it was held that the lease was not thereby avoided and the term gone, but the lessor must seek his remedy by injunction (*u*): but, where the lease is granted for the express purpose of carrying into effect an illegal act, the courts will not lend their aid for the enforcement of any of the provisions of the illegal contract (*x*).

The cancellation of a lease by mutual consent of the parties

(*r*) *The London Loan & Discount Co.* v. *Drake*, 6 C. B. N.S. 798, 28 L. J. C. P. 297.

(*s*) *Andrews* v. *Hailes*, 22 L. J. Q. B. 409; *Kingsmill* v. *Millard*, 11 Exch. 319.

(*t*) *Whitmore* v. *Humphries*, L. R. 7 C. P. 1, 41 L. J. C. P. 43.

(*u*) *Ferret* v. *Hill*, 15 C. B. 226.

(*x*) *Ritchie* v. *Smith*, 6 C. B. 462; *Gas Light Company* v. *Tu[illegible]*, 7 Sc. 779; 8 [illegible]. 609.

discharges the covenants and promises therein contained, but does not divest the estate created by the lease, or destroy the lessor's right of action for the rent founded on the privity of estate. Arrears of rent, therefore, which accrue due prior to the cancellation of a lease may be recovered by the landlord in an action founded on the privity of estate (*y*).

Assignment.—The doctrine of covenants running with the land is confined to covenants annexed to the land by the indenture of demise; and the assignment of a parol tenancy does not pass to the assignee a right of action upon a special stipulation between the original landlord and the lessee (*z*). If, however, the landlord has consented to the substitution of the assignee in the place of the original tenant, that will create a new contract between the landlord and the assignee upon which either may sue (*a*). The equitable assignee of a legal term is not liable to the lessor for rent, or for damages in respect of breaches of covenants, even though he may have been in possession (*b*).

Breach of contract to grant a lease.—The rule which governs sales of real property, that, if the vendor fails to make a good title, the purchaser is only entitled to recover the amount of his deposit and the expenses to which he has been put, does not apply to the case of a lease granted by a lessor in excess of his leasing powers, and containing a covenant for quiet enjoyment; and, if the lease is repudiated by a person having a good title so to do, the lessee is entitled to recover the full value of the lease; and it makes no difference that the lease was a reversionary lease, and that it was repudiated before the lessee had entered into possession under it. In such a case it was held that the lessee was entitled to recover the value of the lease and the expense of the lease so repudiated, but not the expense of a lease of the demised premises which he took from the person really entitled to grant one after the repudiation of the first lease, nor to a 10*l.* per cent. compensation given by the jury, on a supposed analogy to the case of a compulsory sale to a railway company under an act of parliament (*c*). If a man contracts to grant a good and valid lease, without having any colour of title to the premises intended to be demised, the intended lessee is to be placed as far as money can do it in the same position as he would have been in if the contract had been fulfilled, and may recover all the damages he has sustained by reason of the non-performance of the contract, including the

(*y*) *Ward* v. *Lumley*, 5 H. & N. 94; 29 L. J. Ex. 322; *Bolton* v. *Bishop of Carlisle*, 2 H. Bl. 264; 4 B. & A. 677.

(*z*) *Elliott* v. *Johnson*, L. R. 2 Q. B. 120.

(*a*) *Buckworth* v. *Simpson*, 1 C. M. & R. 834.

(*b*) *Cox* v. *Bishop*, 8 De G. M. & G. 815; 26 L. J. Ch. 389. See *Haywood* v. *Brunswick Building Society*, 8 Q.B.D. 403.

(*c*) *Locke* v. *Furze*, 19 C. B. N. S. 96; 34 L. J. C. P. 201; 35 *ib.* 141; L. R. 1 C. P. 441.

loss of the lease (*d*), but not damages and costs arising out of the re-sale of the lease to a third person, these being too remote (*e*).

Actions by landlords for use and occupation of premises.—If lands and houses have been occupied by a tenant under a lease void as to the duration of the term by the statute of frauds, the rent reserved in the lease will be the measure of damages resulting from the breach of the implied contract to pay for the actual use and occupation of the property (*f*). But, when no rent has been fixed upon or ascertained by the agreement of the parties, or the contract has been so far departed from that the stipulated rent forms no just criterion of value, the actual pecuniary value of the occupation will constitute the damage recoverable by the plaintiff. In case of an eviction from part of the premises, the jury must ascertain, independently of any agreement, what ought to be paid (*g*).

Damages for breach of covenants for quiet enjoyment.—A lessee under a void lease who has been ejected by the successor of the lessor has a right, in an action against the executors of the lessor for breach of a covenant for quiet enjoyment contained in his lease, to recover the value of the term (*h*).

Damages for breach of covenant not to assign.—The measure of damages for a breach by an assignee of the lease of a covenant not to assign without licence is such a sum as will, as far as money can, put the plaintiff in the same position as if he had still the defendant's liability, instead of the liability of another of inferior pecuniary ability, for breaches both past and future (*i*).

Damages for breach of covenant to repair.—In an action for breach of a covenant to repair, the proper measure of damages is the amount that it will take to put the premises into repair (*k*); but, in estimating the damages to be recovered, the age and general state and condition of the property at the time of the demise must, as we have already seen, be taken into consideration (*l*). If buildings fall to the ground by reason of the neglect of the covenantor to repair them, or if they are blown down by the wind, or burned by an accidental fire, the proper measure of damages is the amount that it will take to re-build, deducting the difference in value between old materials and new, as the landlord is not entitled to be put in a better position than he was in before the fire took

(*d*) *Robinson* v. *Harman*, 1 Exch. 855; 18 L. J. Ex. 202. See, however, *Wigsell* v. *School for Indigent Blind*, 8 Q. B. D., 357, see *post*, p. 1107.

(*e*) *Spedding* v. *Nevell*, L. R. 4 C. P. 212; 38 L. J. C. P. 133.

(*f*) *Ante*, pp. 234–237; *De Medina* v. *Polson*, Holt, 47.

(*g*) *Tomlinson* v. *Day*, 2 B. & B. 681.

(*h*) *Williams* v. *Burrell*, 1 C. B. 428.

(*i*) *Williams* v. *Earle*, L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*k*) *Vivian* v. *Champion*, 2 Raym. 1125; *Davies* v. *Underwood*, 2 H. & N. 571; 27 L. J. Ex. 113; *Bell* v. *Hayden*, 9 Ir. C. L. R. 301.

(*l*) *Ante*, pp. 237–242; *Burdett* v. *Withers*, 2 N. & P. 123; *Paine* v. *Haync*, 16 M. & W. 541; 16 L. J. Ex. 130.

place, and cannot have the value of a new house when the one he has lost was an old house (m). If there be both a covenant to repair and a covenant to insure against loss from fire for a specific sum, the liability of the covenantor in respect of the cost of re-building in case the premises are burned down is not limited to the amount of the sum covenanted to be insured (n). If the party suing upon the covenant is only tenant for life, with remainder in tail and a reversion in fee, he can only recover such damages as are commensurate with his life estate (o). Where a defendant held premises under a lease with a covenant to keep and yield them up in repair, and at the expiration of the lease the premises were dilapidated to an amount fixed by the jury at 22*l*., and the plaintiff had, before this time, made a verbal agreement with a third person to grant him a lease for a long term, and at once proceeded to pull down the premises, it was held that the plaintiff was, notwithstanding, entitled to recover substantial damages (p).

If a lessor has covenanted to repair a dwelling-house demised by him, and the building is destroyed by fire or becomes ruinous and uninhabitable, the lessee may re-build, if the lessor neglects so to do within a reasonable period after request; and the measure of damages to be recovered by the lessee in such a case will be the costs and expenses of the re-building. We have already seen that covenants to pay rent and covenants to repair, contained in a lease are independent covenants (*ante* p. 228), and that the lessee is not exonerated from his liability to pay rent under his covenant so to do by reason of the non-performance of the lessor's covenant to repair. If, therefore, the lessor neglects to fulfil his covenant, and delays making the repairs, he is responsible in damages for expenses incurred by the lessee in procuring a suitable residence to reside in whilst he is prevented from having the use and enjoyment of the house during the period of delay or neglect to fulfil the covenant. But, if the lessor fulfils his covenant by repairing as soon as he reasonably can, he will not then be responsible for the rent of a house which the lessee may be obliged to take for a residence whilst the repairs are being executed (q). If an action is brought against an assignee of a lease for damages for a breach of covenant to repair, in respect of dilapidations that accrued during the time he was assignee, the criterion of damage is the loss which the landlord would sustain by the non-repair if he went into the market to sell the reversion (r). If an under-lessee refuses to

(m) *Yates* v. *Dunster*, 11 Exch. 15; 24 L. J. Ex. 226.

(n) *Digby* v. *Atkinson*, 4 Campb. 275.

(o) *Evelyn* v. *Raddish*, Holt, 543; *Bedingfield* v. *Onslow*, 3 Lev. 209.

(p) *Rawlings* v. *Morgan*, 18 C. B. N. S. 776; 34 L. J. C. P. 185.

(q) *Green* v. *Eales*, 2 Q. B. 225.

(r) Martin, B., *Smith* v. *Peat*, 9 Exch. 161; 23 L. J. Ex. 85; *Doe* v. *Rowlands*,

repair according to his agreement, and his immediate lessor (the mesne landlord), who is himself a lessee, and bound under pain of forfeiture to keep the premises in repair, enters and repairs them, the measure of damages is the sum necessarily expended in putting them into repair, and not the costs of an action brought by the original lessor against the mesne landlord for non-repair, unless the under-lease contains a covenant to indemnify (*s*), or to perform the covenants of the head lease (*ss*).

Breach of covenants to consume hay and straw on a farm.—If a tenant who has covenanted not to carry away hay or straw from the demised premises nevertheless sells it off the land, the proper measure of damages is not the value of the hay or straw, which is the property of the tenant, but the value of it to the land in the shape of manure, if it had been eaten and consumed by cattle and deposited on the soil. Where the landlord had agreed to purchase the outgoing tenant's straw at a valuation, and the tenant by the terms of the lease, was to return the manure value of straw sold off, it was held that the landlord must pay a fodder price, which is one-half the market price (*t*); and, where the tenant was not to sell straw off the land without returning the value of it in manure, it was held that the tenant was not bound to return the marketable value, but the manure value of the straw to the premises (*u*).

Damages for holding over.—If the tenant holds over, the landlord may, in some cases, as we have seen (*ante*, p. 277), recover double the yearly value, or he may recover the damages and costs he has incurred by not being able to give possession to the succeeding tenant (*x*), and also the costs incurred in ejecting the person in possession (*y*).

Of contracts for the letting and hiring of furnished houses and lodgings.—Contracts for the letting and hiring of ready-furnished houses and apartments are contracts of a mixed nature, partaking partly of the nature of a demise of realty, and partly of a contract for the letting and hiring of moveable chattels (*post*, sect. 3); and the lessor, therefore, in contracts of this description, is clothed with the duties and responsibilities resulting from contracts for the letting and hiring of chattels in addition to those which have been previously described as flowing from demises of realty simply.

Implied warranties on the part of lessors of furnished apart-

9 C. & P. 739; *Bell* v. *Hayden*, 9 Ir. Com. Law Rep. 301; *Mills* v. *East London Union*, L. R. 8 C. P. 79.

(*s*) *Logan* v. *Hall*, 4 C. B. 598; *Smith* v. *Howell*, 6 Exch. 737; *Walker* v. *Hatton*, 10 M. & W. 249; *Colley* v. *Streeton*, 2 B. & C. 273; *Clow* v. *Brogden*, 2 Sc. N. R. 303.

(*ss*) *Hooby* v. *Cardwell*, 8 Q. B. D. 329.

(*t*) *Clarke* v. *Westrope*, *ante*, p. 287.

(*u*) *Lowndes* v. *Fountain*, *ante*, p. 287.

(*x*) *Bramley* v. *Chesterton*, 2 C. B. N. S. 592; 27 L. J. C. P. 23.

(*y*) *Henderson* v. *Squire*, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73.

ments.—If a man furnishes a dwelling-house or an apartment in a house, and offers it to be let ready-furnished, he impliedly holds it out as fit for immediate habitation and use, and the contract for the letting and hiring of it is analogous to a contract for the letting and hiring of a ship rigged and manned and prepared for sea, or of a carriage horsed and equipped and made ready for a journey on land; and there is, consequently, an implied warranty on the part of the lessor that such ready-furnished house or lodging is reasonably fit for habitation and occupation by a tenant. If apartments have been taken on condition that they were reasonably fit for habitation and the furniture for use, and the furniture is unfit for use, or is encumbered with a nuisance of so serious a nature as to deprive the tenant of all beneficial enjoyment of it, the latter is entitled to throw up both house and furniture, and bring an action against the landlord for a breach of contract. Thus, where the beds of a ready-furnished house, let to a tenant at a rent of eight guineas per week, were so infested and over-run with bugs that they could not be slept in, it was held that the tenant was justified in leaving the house and resisting the landlord's demand for the rent (z). "In the case of a contract for the hire of a ready-furnished house," observes Lord Abinger, "the letting of the goods and chattels as well as the house implies that the party who lets the house so furnished is under an obligation to supply the other contracting party with whatever goods and chattels may be fit for the use and occupation of such a house, according to its particular description, and suitable in every respect for his use" (a).

Rights and liabilities of lodging-house keepers and lodgers.—It has been held that a contract for board and lodging, where the lodging-house keeper undertakes generally to provide food and shelter for man and beast, and does not agree to let any particular room, is not a contract for an interest in land (b). A tenant of lodgings is not always entitled to the exclusive possession of his rooms. He may sometimes have "a mere easement of sleeping in one room and eating and drinking in another;" and the landlord and his servants may have a right to enter at all times (c). When a man lets apartments in a house, he impliedly demises them with all their proper accompaniments, and warrants to the hirer the use of all such accessorial things as are necessary to enable him to enjoy the principal subject-matter of the demise in the manner intended. He impliedly grants to the tenant the use of the door-bell, the knocker, the skylights or windows of the staircase, and

(z) *Smith* v. *Marrable*, 11 M. & W. 5, cited 12 M. & W. 60, 65, 87; *Campbell* v. *Lord Wenlock*, 4 F. & F. 716.

(a) *Sutton* v. *Temple*, 12 M. & W. 60; see also *Wilson* v. *Finch Halton*, 2 Ex. D. 336.

(b) *Ante*, p. 160.

(c) Maule, J., 3 C. P. 784.

the use of the water-closet, unless it be otherwise stipulated at the time of the taking of the lodgings; and, if the landlord deprives him of the use of either, he forthwith subjects himself to an action for a breach of contract (*d*). The lodging-house keeper, moreover, who remains in the general possession of the house, is bound to exercise all ordinary and reasonable care for the protection of the persons and property of his tenants and lodgers; to see that the outer door is fastened at night, and that strangers or suspected or doubtful characters are not permitted, unknown to the lodger, to congregate in the house at unseasonable hours of the night. He is bound, moreover, to exercise ordinary care and vigilance in the selection and appointment of the servants and domestics within the house, and to take all such precautions as a prudent householder may be expected to take to guard against robbery and fire; but he is not responsible for the safe keeping of the property of his lodgers (*e*), unless it has been delivered into his hands to be safely kept (*post*, 356). If, after having taken ordinary care in the selection of his servants, a theft is committed on the property of a lodger, in consequence of the front door having been incautiously left open by one of the servants who has been sent out on an errand by the guest, the lodging-house keeper is not responsible for the loss (*f*). Nor is he responsible for the loss of things stolen from the lodgers by his own servants (*g*).

The lodger on the other hand may be sued for use and occupation (*ante*, p. 234); and, if he brings goods and chattels of his own upon the premises, they may be distrained for the rent of the lodgings as in the ordinary cases of demises of pure realty (*h*). If the possession as well as the use of the furniture is granted to the lessee, the latter is bound to deliver up the furniture at the expiration of the term in good order and condition, deteriorated only by ordinary wear and tear and the reasonable use of it. If he received linen, plate, and household utensils clean and fit for use, and agreed "to leave them as he found them," he is bound to render the things back to the lessor in a clean stat contract

Destruction of buildings by fire.—Where a giving of s entered into for the use of a furnished saloon for the time ap concert, and the saloon is destroyed by fire before the used fro inted for the concert, the parties to the contract are exc performance of it (*k*).

Proof of the duration of the term of hiri ai ng.—I lgings and

(*d*) *Underwood* v. *Burrows*, 7 C. & P. 28.

(*e*) *Holder* v. *Soulby*, 8 C. B. N. S. 254; 29 L. J. C. P. 246.

(*f*) *Dansey* v. *Richardson*, 3 E. & B. 144; 23 L. J. Q. B. 217.

(*g*) *Holder* v. Soulby v. Anpra

(*h*) *Newman* was rton, 5 B. & P. 227. lwick

(*i*) *Stanley* v. *Agnew*, 12 M. & W. 827.

(*k*) *Taylor* v. *Cal*[illegible]*ll*, 32 L. J. Q. B. 165; *post*, p. 356.

ready-furnished apartments are rarely the subject of a yearly hiring; and there is no presumption, from a general holding thereof, in favour of a hiring for a year, and from year to year, as in the case of a demise of land (*l*). The duration of the term corresponds, in general, with the time limited for the payment of the rent. If the rent is payable quarterly, the presumption is in favour of a hiring by the quarter; if, on the other hand, it is payable monthly or weekly, there is a hiring by the month or week. The same rules prevail in the French law (*m*). Where a tenant agreed to pay for the occupation of furnished apartments, "from March the 4th to September the 4th, the sum of 52*l*. 10*s*.," also "to occupy the rooms from the 4th of September to the 4th of December on the same terms, viz., 26*l*. 5*s*. for the three months, or to take them unfurnished at the rate of 84*l*. per annum," it was held that this was a lease for six months and for a further period of three months, and not a lease from year to year (*n*).

Notice to quit.—If the tenancy is for one single quarter, month, or week, no notice to quit is requisite, as the duration of the holding is fixed and determined; but, if the hiring be from half-year to half-year, half-a-year's notice to quit must be given; if from quarter to quarter, a quarter's notice; if from month to month, a month's notice, and if from week to week, a week's notice to quit is, in general, requisite by custom and usage (*o*). If there is no custom, a reasonable notice is requisite (*p*); and, if the lodger quits his apartments without giving such notice, he is liable to the payment of a quarter's, a month's or a week's rent, according to the term of hiring; and the lodging-house keeper may recover such rent, although he has put a bill in the windows advertising the apartments to be let, or has lighted fires in and used the rooms (*q*). The length of the notice may be otherwise regulated by the express agreement of the parties, and also by the custom and usage of the district. It must, however, in all cases, expire at the end of the current term [illegible]f hiring. If a tenant remains in possession of lodgings aft[illegible]e termination of his term of hiring, or after the expiratio[illegible]e to quit, the landlord may, as we have seen, assert hi[illegible]orce (ante, p. 279).

Letti[illegible]ng of stowage and places of deposit.—A contract for [illegible]g and hiring of a vault, or store, or place of deposit i[illegible]house, is a contract analogous to the letting and hiring [illegible]partment in a house for the occupation of a

(*l*) *Willson* v. [illegible] 4 D. & R. 694.

(*m*) Pothier, L[illegible] No. 30.

(*n*) *Atherstone* v. [illegible]*tock*, 2 Sc. N. R. 643.

(*o*) But the custom must be proved; *Huffel* v. *Armistead*, 7 C. & P. 56.

(*p*) *Jones* v. *Mills*, 10 C. B. N. S. 788; 31 L. J. C. P. 66.

(*q*) *Redpath* v. *Roberts*, 3 Esp. 225; *Griffith* v. *Hodges*, 1 C. & P. 419; *ante*, p. 263.

tenant or lodger. But the landlord only contracts that the place is fit for use so far as reasonable care can make it so; and, therefore, where a tenant hired the ground floor of a warehouse, the upper part of which was occupied by the landlord himself, and the water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains, and a hole was made in the box by rats, through which the water entered the warehouse and wetted the tenant's goods, but the landlord had exercised reasonable care in examining and seeing to the security of the gutters and box, it was held that he was not liable for the damage so caused (r). In the civil law, a man who let out a store or place of deposit for corn, wine, oil, or merchandise of a perishable character, impliedly warranted his store-house to be fit for the purpose for which it was known to be required. If the hirer had inspected it, and approved it prior to the contract, the store-keeper was not responsible for patent defects which the hirer might by the exercise of ordinary vigilance have made himself acquainted with; but for all latent defects causing injury to the property deposited he was responsible. If the store-room was in a roofed building, he was bound to keep the roof water-tight. If the places of deposit were upon or below the surface of the ground, he was bound to keep them properly drained and free from water. If he remained in the general possession of the premises, it was his duty to see that the outer gates were fastened at a proper hour of the night, that suspicious characters were not permitted to lurk about the spot, and that the rooms and stores were watched with proper and reasonable care (s). He was bound, in short, to take all ordinary precautions to secure his store-house from attacks from without, and from dangers within, from damage by fire and damp, and from all things hurtful to the property deposited beneath his roof.

Room or standing-places in factories.—An agreement for the use of room in a factory for the purpose of working machines will amount to a demise, if it is a letting of a defined portion of the room separated from the remaining portion, with exclusive possession by the person taking it; but will not amount to a demise if it is a mere letting of an on-stand for a machine (t).

Lodgings in common inns—Who may be said to be a common innkeeper.—Every person who makes it his business to entertain

(r) *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; 40 L. J. Ex. 129.

(s) Pandect. ed. Poth., lib. 19, tit. 2, s. 3, art. 3, 71.

(t) See *Selby* v. *Greaves*, L. R. 3 C. P. 594, where it was held there was a demise, and *Hardwick* v. *Austin*, 14 C. B. N. S. 429; 32 L. J. C. P. 252, where the contrary was held; see also 41 Vict. c. 16, s. 93.

travellers and passengers, and provide lodging and necessaries for them and their horses and attendants, is a common innkeeper; and it is in no way material whether he have any sign before his door or not (*u*). A London "coffee-house," where beds and provisions are furnished by the day, or for the night, or for a longer period, to all persons who may think fit to apply for them, is a common inn; and all persons who are willing and able to pay the customary hire are entitled to be received as guests at an inn, whether they are wayfarers or travellers, or merely residents in the locality (*x*). But, if a man merely opens a house for the sale of provisions and refreshments, and does not profess to furnish beds and lodging for the night, he is not a common innkeeper (*y*). And, if he professes to let only private lodgings, and does not offer his house to the public as a place of reception and entertainment and lodging for all comers who are able and willing to pay for the accommodation offered, he cannot be said to keep a common inn.

Duties of innkeepers.—Every man who opens an inn by the wayside, and professes to exercise the business and employment of a common innkeeper, is, by the custom of the realm, bound to afford such shelter and accommodation as he possesses to all travellers (*z*) who apply and tender, or are able and ready to pay, the customary hire, and are not drunk or disorderly, or labouring under contagious or infectious diseases. And, if he neglects or refuses so to do, he is liable to an action for the recovery of any damages that may have been sustained by reason of such refusal, and also to an indictment at common law (*a*). The innkeeper is bound, moreover, if he has room in his stables, to receive and provide for the horses of travellers who alight at his inn, intending to become guests and to lodge there; but he is not bound to receive horses from parties who merely intend to make use of his stables as livery and bait stables, resorting elsewhere for lodging and entertainment; nor is he bound to receive the goods of a person who professes merely to make use of the inn as a place of deposit, and not to lodge there as a guest (*b*). Neither is he bound to provide for his guest the precise room that the latter may choose to select, nor to provide him with a bedroom, if he declares it to be his intention to sit up all night. All that he is required to do is to find reasonable and proper accommodation for his guests; and, if he tenders such accommodation, and the guest

(*u*) Bac. Abr. INNS, (B.); *Parker* v. *Flint*, 12 Mod. 255.

(*x*) *Thompson* v. *Lacy*, 3 B. & Ald. 283.

(*y*) *Doe* v. *Laming*, 4 Campb. 77.

(*z*) *Taylor* v. *Humphreys*, 30 L. J. M. C. 242; see *Copley* v. *Burton*, L. R. 5 C. P. 489.

(*a*) *Hawthorn* v. *Hammond*, 1 C. & K. 404; *Howell* v. *Jackson*, 6 C. & P. 725; *Rex* v. *Ivens*, 7 C. & P. 219.

(*b*) *Smith* v. *Dearlove*, 6 C. B. 132; *Binns* v. *Pigot*, 9 C. & P. 209; *Day* v. *Bather*, 2 H. & C. 14.

refuses it, he may compel the latter to quit the inn, and seek for accommodation and lodging elsewhere (*c*).

The extent of the public duty and obligation of the innkeeper depends mainly upon the nature of his public profession. If he has only a stable for a horse he is not bound to receive a carriage. If he professes only to receive ordinary luggage accompanying the person of a traveller, he is not bound to take in articles of unusual, extraordinary, and inconvenient bulk, nor goods which do not accompany the person of the guest (*d*). An innkeeper is not an insurer of the goods of his guest, but is answerable for negligence (*e*).

The innkeeper cannot discharge himself of the duty and burthen imposed upon him by the common law by express notice to his guests (*f*), or under pretence of sickness, want of understanding, or absence from home (*g*); but if an infant keeps a common inn, an action upon the custom of inns will not lie against him, for his privilege of infancy shall be preferred, and take place of the custom (*h*).

The liability of the innkeeper as such will continue, it seems, for some reasonable time after the departure of a guest who has left his goods to be sent for with the landlord's consent (*i*); and it is certain that his liability continues during the temporary absence of his guest (*k*), for where the plaintiff went away from an inn, stating that he would return the following Monday, and left his horse at the inn, and did not return for a fortnight, it was held that the innkeeper was liable for an injury to the horse caused by negligence, as the relation of innkeeper and guest existed until something was done to indicate the contrary.

Of the protection of the guest from robbery and theft.—It is said that the innkeeper is not liable for the loss of his guest's goods by burglary or robbery with violence where he can show that the force which occasioned the loss was truly irresistible (*l*). But however this may be it is certain that to the duties and obligations which attach to innkeepers in common with all lodging-house keepers and lessors of furnished rooms and apartments for immediate occupation, the law has superadded the

(*c*) *Fell* v. *Knight*, 8 M. & W. 276.

(*d*) *Broadwood* v. *Granara*, 10 Exch. 423; 24 Law J. Exch. 1.

(*e*) *Calye's case*, 1 Sm. L. C. 5th ed. 102; *Dawson* v. *Chamney*, 5 Q B. 164; as to liability to person coming to the inn but not to deal there, see *Oxford* v. *Prior*, 14 W. R. 611; and as to a temporary caller for refreshment, see *Bennett* v. *Mellor*, 5 T. R. 173.

(*f*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 Law J. Exch. 131; see however 26 & 27 Vict. c. 41, *post*, p. 302.

(*g*) Bac Abr. INNS, C. 4.

(*h*) *Cross* v. *Andrews*, Roll. Abr. 2; Carth. 161.

(*i*) See per Brown, C.J., in *Adams* v. *Clem*, 41 Ga. 67.

(*k*) *Day* v. *Bather*, 2 H. & C. 14.

(*l*) Jones on Bailments, 96.

duty of protecting the goods of their guests from robbery (*m*). But if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for there the fault is in the guest to have such a companion or servant (*n*). The innkeeper will not be liable, if the loss would probably not have happened had the guest used the care which a prudent man might reasonably have been expected to take under the circumstances (*o*).

Where a guest laid a reticule containing money on her bed, and afterwards went into her sitting-room, the door of which was opposite the bedroom, and remained there about five minutes, and then sent her companion for the reticule, which was missing, and could not afterwards be found, it was held that the innkeeper was bound to make good the loss (*p*).

A traveller went to an inn, taking with him divers packages of silk, some of which were taken up-stairs to his bedroom, and others were, by his directions, carried into the commercial room, into which he was shown. After remaining for some days therein, and after having been several times taken out and brought back again by the traveller, the goods were stolen, and an action having been brought against the innkeeper to recover the value of the property, it was shown to be the practice of the inn to take all the luggage of the guests into their bedrooms, unless orders to the contrary were given; and it was contended that the traveller, by ordering the goods to be taken into the commercial room, which was a place of common resort for all the guests indiscriminately, had taken the goods under his own protection, and could not therefore make the innkeeper responsible for the loss; but the court held, that if the innkeeper had intended not to be responsible for goods deposited by the guests in the commercial room, he should have declared his intention to them at the time the goods were placed there (*q*). But if the guest is guilty of gross negligence in leaving a box containing money or bank-notes in the commercial room, after having opened it and exposed the contents to the bystanders, he cannot, if the money is stolen, charge the innkeeper with the loss (*r*).

A servant having been sent with goods to market, and being unable to sell them, went to an inn, and asked if he could leave

(*m*) *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131; but see now the 26 & 27 Vict. c. 41, *post* p. 302; as to the sufficiency of notice under the Act, see *Spice* v. *Bacon*, 3 Ex. D. 463.

(*n*) *Calye's case*, 8 Co. Rep. 32, a.

(*o*) *Oppenheim* v. *White Lion Hotel Company*, L. R. 6 C. P. 515; 40 L. J. C. P. 93.

(*p*) *Kent* v. *Shuckard*, 2 B. & Ad. 803.

(*q*) *Richmond* v. *Smith*, 8 B. & C. 9.

(*r*) *Armistead* v. *White*, 20 Law J. Q. B. 524; *S. C.* nom. *Armistead* v. *Wilde*, 17 Q. B. 261.

the goods there until next market-day. The innkeeper's wife said they were very full of parcels, and declined to take charge of them. The servant then sat down in the inn, ordered something to drink, and put the goods on the floor immediately behind him. When he got up again the goods were gone, and were never afterwards seen or heard of, and it was held that the innkeeper was responsible for the loss (s). But "if a guest come to a common innkeeper to harbour there, and he say that his house is full of guests, and do not admit him, &c., and the party say he will make shift among the other guests, and be there robbed of his goods, the innkeeper shall not be charged" (t). And if a guest takes upon himself the exclusive charge of the goods which he brings into the house of an innkeeper, he cannot afterwards charge the innkeeper with the loss (u). "I agree," observes Lord Ellenborough, "in what is stated in *Calye's case*, that the mere delivery of the key of a room will not dispense with the care and attention due from the landlord, and that he cannot exonerate himself by merely handing a key over to his guest; but if the guest take the key, it is a very proper question for a jury, whether he takes it *animo custodiendi*, and for the purpose of exempting the landlord from his liability, or whether he takes it merely because the landlord forced it upon him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room" (x). And where a guest, having the key delivered to him, omits to use it, and a thief comes into his room by the door and steals his goods, that is, or may be, evidence for the jury of contributory negligence, which will disentitle him to recover against the innkeeper. The question is, whether the loss would or would not have happened, if the guest had used the ordinary care that a prudent man might be reasonably expected to take under the circumstances (y); "what would be prudent in a small hotel in a small town might be the extreme of imprudence in a large hotel in a large city, where, probably, three hundred bedrooms are occupied by people of all sorts" (z).

Whenever the goods and chattels of the guest have been actually delivered to the innkeeper or his servants the latter cannot, of course, discharge himself from the strict common-law responsibility by showing that the goods were stolen outside the inn, if he has himself placed them in the spot from whence they have been taken. Where the plaintiff, a farmer, drove his horse and gig to an inn on a market-day, and the hostler took the horse

(s) *Bennet* v. *Mellor*, 5 T. R. 276.
(t) *White's case*, Dyer, 158, b.
(u) *Farnworth* v. *Packwood*, 1 Stark. 249.
(x) *Burgess* v. *Clements*, 4 M. & S. 310; 1 Stark. 252, n.
(y) *Oppenheim* v. *White Lion Hotel Co.*, L. R. 6 C. P. 515; 40 L. J. C. P. 231.
(z) *Per* Montague Smith, J., *S. C.*

out of the gig and put him into a stable, and then placed the gig outside of the inn-yard, in a part of the open street where the innkeeper was in the habit of placing the carriages of his guests on fair-days, and the gig was stolen therefrom by some person unknown, it was held that the innkeeper was responsible for the loss (*a*). And the innkeeper is liable, although sick at the time, and incapable of attending to his affairs, for he is bound to retain trusty servants to secure the goods of his guests when incapable of doing so himself (*b*). This extended responsibility of the innkeeper, which makes him an insurer of the goods against loss by robbery, does not extend to losses occasioned by an accidental fire (14 Geo. 3, c. 78, s. 86), nor to damage or injury to the goods which is the result of accident. The innkeeper is not responsible for injuries which the horses of guests inflict upon each other in the stables of the inn, provided he has taken all due care to prevent the introduction into the stables of vicious and kicking horses (*c*).

Limitation by statute of the liability of innkeepers.—By 26 & 27 Vict. c. 41, s. 1, it is enacted, that no innkeeper shall be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of *thirty pounds;* except where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ, or where such goods or property shall have been deposited expressly for safe custody with such innkeeper.

If any innkeeper refuses to receive for safe custody any goods or property of his guest, or if any guest, through any default of such innkeeper, is unable to deposit such goods or property as are mentioned in the Act, the innkeeper will not be entitled to the benefit of the Act in respect of such goods or property (s. 2). In the case of a depost for safe custody, the innkeeper may require, as a condition of his liability, that the goods or property be deposited in a box or other receptacle, fastened and sealed by the person depositing the same (s. 1).

Every innkeeper is required to cause at least one copy (*d*) of the first section of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he is entitled to the benefit of the Act in respect of such goods or pro-

(*a*) *Jones* v. *Tyler*, 1 Ad. & E. 522; 3 N. & M. 576.

(*b*) *Cross* v. *Andrews*, Cro. Eliz. 622.

(*c*) *Dawson* v. *Chamney*, 5 Q. B. 105, explained and qualified by *Morgan* v. *Ravey*, 30 Law J., Exch. 134.

(*d*) Such copy should be a correct copy, see *Spice* v. *Bacon*, L. R. 2 Ex. D. 463, C. A.; 46 L. J. Sc. 713.

perty only as shall be brought to his inn while such copy shall be exhibited (s. 3). By the interpretation clause (s. 4) it is declared, "that the word inn shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests, and the word 'innkeeper' shall mean the keeper of any such place."

Losses occasioned by the misconduct of the guest.—If a guest at an inn asks for a private room for the purpose of exhibiting goods for sale, and receives customers, and invites the admission of strangers into the inn, upon whose ingress and egress the innkeeper has no check, the latter is not responsible for the safety of the goods in the room so used (*e*). And if the guest is himself guilty of negligence in leaving money and valuables about in rooms of common resort, he cannot, if the money and valuables are stolen, charge the innkeeper with the loss (*f*).

The rule of law resulting from all the authorities is, that the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable for a breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened, if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances (*g*).

Who are guests and travellers.—He who seeks to charge another as an innkeeper for the loss of goods must show that he was a traveller and guest at the inn. If a man who has been a guest gives up his room and quits the inn for a few days, intending to return, and asks for permission to leave his goods at the inn, and the innkeeper takes charge of them, the latter is clothed only with the ordinary duties and responsibilities of a bailee, for a man does not become a guest at an inn by the mere delivery of goods to the landlord to keep (*h*). It has been said, however, that a man may become "a guest by leaving his horse as much as if he had stayed himself, because the horse must be fed, by which the innkeeper has gain, otherwise than if he had left a trunk or a dead thing" (*i*). "If an host invite one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller" (*k*).

The length of time that a man may remain at an inn does not affect or alter his character as a traveller, or in any way qualify or

(*e*) *Burgess* v. *Clements*, 1 Stark. 251, n.; 4 M. & S. 306.

(*f*) *Armistead* v. *White*, *ante*, p. 300; *Sanders* v. *Spencer*, Dyer, 266, a.; and *ante*, p. 301.

(*g*) *Cashill* v. *Wright*, 6 Ell. & Bl. 900; see *ante*, p. 301.

(*h*) *Gelley* v. *Clerk*, Cro. Jac. 188; *Smith* v. *Dearlove*, 6 C. B. 132.

(*i*) *York* v. *Grindstone*, 1 Salk. 388; *Bather* v. *Day*, 32 Law J. Exch. 171.

(*k*) Bac. Abr. INNS, C. 5.

vary the common-law liability of the innkeeper. Thus, "If A. comes with goods to an inn in London, and stays there for a week, month, or longer, and is there robbed of them, he shall have an action against his host; though, perhaps, being at the end of his journey, he cannot then be said to be *transeuns* according to the writ in the register (*l*). But if a man takes apartments in an inn for a term, by the week, month, or year, for example, or if he resides in an inn under a special contract for his bed and board, he is not in contemplation of law sojourning at the inn as a traveller but rather in the character of a lodger at a private boarding-house. If, therefore, he is robbed in the house, he cannot charge the landlord as an innkeeper (*m*). Holt, C.J., is reported to have held, "that if one come to an inn and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such he is not under the innkeeper's protection; but if he eat and drink there it is otherwise, or if he pay for his diet there, though he do not take it there" (*n*).

Exemption of the guest's property from distress for rent.—The carriages and horses, goods and chattels of guests sojourning at public inns cannot be distrained by the landlord for the rent of the premises (*o*).

Innkeepers' lien.—An innkeeper has a lien upon goods belonging to the guest, and brought by him to the inn, for his charges for board and lodging supplied to the guest (*p*); and it has been held that the lien attaches even when the goods do not belong to the guest, if the innkeeper receives them in the belief that they do so belong; and also when the goods are such as the innkeeper was not bound to receive (*q*); and to goods deposited with him by his guest (*r*). But he cannot detain the person of his guest, or take off his clothing, in order to obtain payment of his bill (*s*). If he sells the goods his lien is destroyed (*t*). An innkeeper has now a right to sell goods left at his inn after six weeks, where the person depositing is his debtor, subject to certain provisions (*u*).

The innkeeper holds the chattels detained by him in the nature of a pledge, so that if he once permits his guest to take them away, and so relinquishes his pledge, he cannot afterwards retake them. Therefore, if the innkeeper allows his guest to remove his horses after a debt has been incurred for keeping them, and they

(*l*) Bac Abr. INNS, C 5.
(*m*) Warburton, J., *Watbroke* v. *Griffith*, Moore, 877; *Grinston* v. *Innkeeper*, Hetl. 49.
(*n*) *Parker* v. *Flint*, 12 Mod. 255.
(*o*) Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 68, pl. 12.
(*p*) *Thompson* v. *Lacy*, 3 B. & A. 283.
(*q*) *Threfall* v *Borwick*, L. R. 7 Q. B. 711; 10 Q. B 210; 41 L. J. Q. B. 266; 44 L. J. Q. B. 87.
(*r*) *Mulliner* v. *Florence*, 3 Q. B. D. 484.
(*s*) *Sunbolf* v. *Alford*, 3 M. & W. 248.
(*t*) *Mulliner* v. *Florence*, *suprà*.
(*u*) 41 & 42 Vict. c. 38.

are afterwards brought to the inn and a new debt contracted, the innkeeper can detain them for the latter portion of the debt, but not for the former (x). And it is said that if several horses are brought to an inn by the guest, each is a pledge for its own keep, but not for the keep of the others; so that if the hosteller permit him to take away all but one, he cannot retain that one until the expense of the whole is paid (y). If the guest takes the chattel away without the hosteller's consent, the latter may take it on a fresh pursuit as a distress rescued, if he follow promptly, but not otherwise (z). However long horses may remain at an inn, the relative duties and obligations of innkeeper and guest continue until some fresh contract or arrangement is made (a).

Liability of lodging-house keepers.—By the first resolution in *Calye's case* (aa), it was held, "that if a man be lodged with another who is not an innholder, if he be robbed in his house by the servants of him who lodged him or any other, he shall not answer for it." But it is the duty of every lodging-house keeper to take such care of his house as every prudent householder might be expected to take, and to be careful in the choice of his servants. If articles belonging to the lodger are actually placed in his hands he will be responsible, like any other bailee (*post*, p. 356), for the loss of them; but he is not a bailee of them merely by reason of their having accompanied the person of the lodger and been placed in his house by the latter. The law is, that the lodger must take care of his own goods in his lodgings (b).

Gratuitous loans of realty—The gratuitously permitting a person to use a shed, by himself or his servant, for a particular purpose, is a mere revocable licence, and has no analogy to a bailment of personal property, and the only duty imposed on such person is that there shall not be negligence in the use of the shed; and he is not responsible for the negligence of his servant not within the scope of his employment (c)

(x) *Jones* v. *Thurloe*, 8 Mod 173, *Jones* v. *Pearle*, 1 Str 556, 557.

(y) *Moss* v. *Townsend*, 1 Bulstr 207

(z) *Rosse* v *Bramsteed*, 2 Roll. 438

(a) *Allen* v. *Smith*, 12 C. B N S. 638; 31 Law J. C P 306.

(aa) *Calye's Case*, 8 Co. Rep 32 a.

(b) *Holder* v *Soulby*, 8 C. B. N. S. 254, 29 Law J C. P 246, *Dansey* v. *Richardson*, 3 Ell. & Bl. 144, 23 Law J. Q B 223

(c) *Williams* v. *Jones*, 33 L. J. Ex. 297

SECTION II.

DISTRESS FOR RENT.

Distress for rent in arrear.—By the common law, as we have seen, *ante*, p. 233, landlords to whom rent is due, and who are clothed with the immediate reversion of the premises out of which the rent issues, have the power of entering in person, or by deputy, upon the demised premises (*a*), and seizing the moveables and personal property thereon, with certain exceptions, and holding them as a pledge for the payment of the rent; and they have now by statute the power of selling the things distrained.

It is essential to the lawful exercise of the power of distress, that there be a tenancy (*b*) for a term, or at will, at an ascertained rent (*c*), and that the distrainor be the person entitled to the reversion of the premises distrained upon, on the determination of the existing tenancy. "If he has made a lease without having any right or title to grant a lease, or if, after the making of the lease, he has sold and transferred his estate or interest to some third party (*e*), or being himself only a lessee, he has assigned his lease, or if, after granting an under-lease, he has forfeited his estate by some breach of covenant or otherwise, and the superior landlord has entered, and the tenant has attorned to the latter, he has no right or power to distrain (*f*). It has been held, that a tenant from year to year underletting from year to year, has a reversion which enables him to distrain for rent reserved upon such under-lease" (*g*). *However, although the distrainor be not entitled to the immediate reversion, the distrainee may be estopped from denying that he is entitled to it (*h*).

If the lease has been put an end to by a surrender of the term, or by a notice to quit, and the tenant, notwithstanding the termination of the demise, continues to hold, with the permission of the landlord, as tenant-at-will, or adversely and against the will of the lord as a wrong-doer, the lessor has no power at common law to

(*a*) See *Selby* v. *Greaves*, L. R. 3 C. P. 594.

(*b*) See *Clowes* v. *Hughes*, L. R. 5 Exch. 160, in which case the distress was made by a mortgagee upon the mortgaged lands under an agreement contained in the mortgage deed.

(*c*) *Anderson* v. *Mid. Ry. Co.*, 30 Law J. Q. B. 94; *Howe* v. *Scarrott*, 28 Law J. Exch. 325; *Jolly* v. *Arbuthnot*, 28 Law J. Ch. 547; Addison on Contracts, p. 316, 6th ed.

(*e*) *Parmenter* v. *Webber*, 8 Taunt. 593; 2 Moore, 656; *Preece* v. *Corrie*, 2 M. & P. 64; 5 Bing. 24; 5 M. & Ry. 157, 162; *Smith* v. *Mapleback*, 1 T. R. 441.

(*f*) *Burne* v. *Richardson*, 4 Taunt. 720; *Hopcroft* v. *Keys*, 2 M. & Sc. 760; 9 Bing. 613; *Langford* v. *Selmes*, 3 K. & J. 229.

(*g*) *Curtis* v. *Wheeler*, M. & M. 493.

(*h*) *Morton* v. *Woods*, L. R. 3 Q. B. 658; 4 *ib.* 293; 28 Law J. Q. B. 81.

distrain the goods and chattels of the tenant for rent in respect of such occupation (*i*). Neither can he distrain, except under the statute of Anne (*post*, p. 310), for rent that accrued due before the determination of the lease. But any slight evidence of a renewal of the tenancy, and of an agreement to hold upon the former terms, would be sufficient to justify the landlord in distraining for the old rent (*k*). A distress affirms the tenancy up to the day when the rent became due (*kk*).

If the tenant becomes bankrupt or files a petition for liquidation by arrangement, the landlord or other person to whom any rent is due may still distrain, but if the distress be levied after the commencement of the bankruptcy, it is not available for more than one year's rent accrued due prior to the date of the order of adjudication (*l*). *A fortiori* therefore if the trustee in bankruptcy declines to take the lease, the lessor is not, in case the bankrupt tenant continues to hold the property, deprived by the bankruptcy of his right to distrain (*m*). Nor is he so deprived, if the creditors determine to accept a composition under s. 126 and the bankrupt tenant remains in possession (*n*). If a lessee, having granted an under-lease, becomes bankrupt, such bankrupt lessee is not deprived by the bankruptcy of his right to distrain, unless the assignees have taken to the lease and discharged the bankrupt from the rent payable to the superior landlord (*o*). The power of distress is always subservient to prerogative process issued by the crown, such as an extent; and the sheriff may consequently take goods that have been distrained out of the hands of the landlord or his bailiff, and sell them for the benefit of the crown (*p*). A landlord, moreover, cannot distrain twice for the same rent, unless the distress has been withdrawn at the instance or request of the tenant, or unless there has been some mistake as to the value of the things taken. It is vexatious and actionable in a landlord to make repeated distresses unnecessarily (*q*).

When there is no certain ascertained rent there is no right to distrain.—If lands and houses have been demised together at one

(*i*) *Jenner* v. *Clegg*, 1 M. & Rob. 213; *Alford* v. *Vickery*, 1 Car. & Marsh. 283; *Phené* v. *Popplewell*, 12 C. B. N. S. 334; 31 Law J. C. P. 235.

(*k*) *Zouch* v. *Willingale*, 1 H. Bl. 311; *Beavan* v. *Delahay*, 1 H. Bl. 8.

(*kk*) *Cotlesworth* v. *Spokes*, 10 C. B. N. S. 103; 30 L. J. C. P. 220.

(*l*) 32 & 33 Vict. c. 71, s. 34; *Ex parte Birm. & Staff. Gas Light Co.*, L. R. 11 Eq. Ca. 615; see *Re Lundy Granite Co.*, *post*, p. 320.

(*m*) *Briggs* v. *Sowry*, 8 M. & W. 729; *Newton* v. *Scott*, 10 M. & W. 471; *Phillips* v. *Sherrill*, 6 Q. B. 944; 14 Law J. Q. B. 144; see 32 & 33 Vict. c. 71, s. 23.

(*n*) *Ex parte Birm. Gas Light Co.*, L. R. 11 Eq. Ca. 204.

(*o*) *Peskett* v. *Somers*, coram Wilde, C. J., Sittings after Hil. Term, 1850; but see 32 & 33 Vict. c 71, s. 23.

(*p*) *Rex* v. *Cotton*, Parker, 112; and see 32 & 33 Vict. c. 14, s. 31, as to a distress at suit of the crown on property of bankrupt for duties, &c., under that Act.

(*q*) *Bagge* v *Mauby*, 8 Exch. 649; *Dawson* v. *Cropp*, 1 C. B. 961.

entire rent, and the lease is void as to part of the subject-matter of the demise and good for the residue, the lessor cannot distrain for the rent, as there is no distinct and ascertained rent fixed in respect of the part for which the lease is good (*r*). Where there was a lease of one hundred acres of land at an annual rent of 79*l.*, and eight of these acres were in the possession of another tenant under a prior demise, it was held that the lessor could not distrain for any part of the rent, as it was reserved in respect of the whole one hundred acres, and the rent was entire and unapportionable (*s*). But where a new agreement is come to, providing for a specified reduction of rent, or for an ascertained and settled compensation in respect of the part held under the prior demise, such agreement may operate as a re-demise at an ascertained rent, recoverable by distress (*t*).

Where an oral agreement was entered into between the proprietor of a marl-pit and brick-mine, and a potter and brickmaker, upon the terms that the latter should pay 8*d.* per solid yard for all the marl that he got out of the marl-pit, and 1*s.* 8*d.* per thousand for all the bricks that he made from the brick-mine, by quarterly payments at the usual quarter-days, and the brickmaker took possession of the pit and mine, and dug marl and burnt bricks, and made several quarterly payments, it was held that this was a demise from year to year at a rent capable of being ascertained with certainty, and that the lessor, therefore, was entitled to distrain (*u*). And where land was held upon the terms that the plaintiff should not sell hay off the demised premises under a penalty of 2*s.* 6*d.* a yard, to be recovered by distress as for rent in arrear, it was held that the penalty might be treated as a rent payable in respect of every sale made in breach of the agreement, that the amount due was capable of being ascertained with certainty, and might be recovered by distress (*x*).

If a tenant has entered into possession under an agreement which does not operate as a present demise at a fixed rent, but merely as an executory contract for a future lease afterwards to be granted, and the landlord neglects to grant the lease, and the tenant continues to occupy without paying any rent or making any absolute and unconditional admission of any specific sum being due as rent in respect of such occupation, the landlord has no right to distrain (*y*). But whenever there is an agreement for a tenancy at a fixed rent, though it be a tenancy-at-will only (*z*), or

(*r*) *Gardiner* v. *Williamson*, 2 B. & Ad. 339.
(*s*) *Neale* v. *Mackenzie*, 1 M. & W. 768.
(*t*) *Watson* v. *Waud*, 8 Exch. 335.
(*u*) *Daniel* v. *Gracie*, 6 Q. B. 145.
(*x*) *Pollitt* v. *Forest*, 11 Q. B. 949; 16 Law J. Q. B. 424.
(*y*) *Hegan* v. *Johnson*, 2 Taunt. 148.
(*z*) *Anderson* v. *Mid. Ry. Co.*, 30 Law J. Q. B. 96.

whenever by payment of rent, or otherwise, any tenancy at a fixed rent can be implied, the landlord may distrain for all rent subsequently accruing due (*a*). And if the tenant, after he has taken possession, "promises to pay a rent certain, or settles it in account, the landlord will then have a right to distrain" (*b*). So, if a man, on being let into possession under an agreement for purchase, signs an agreement admitting that he is tenant at a certain rent, he may be distrained upon (*c*).

By the 14 & 15 Vict. c. 25, s. 1, it is provided, that where the lease of any farm or lands shall determine by the death or cesser of the estate of a landlord entitled for life or for some uncertain interest, instead of a claim to emblements, the tenant shall continue to hold till the expiration of the then current year, and shall then quit as if his lease had expired by effluxion of time, and the succeeding landlord shall be entitled "*to recover* and receive of the tenant" a fair proportion of the rent for the period since the lessor's death. The above act applies to all tenancies in respect of which there exists a valid claim to emblements, and confers a right to distrain for the rent as well as to recover it by action (*d*).

Of conditions precedent to the right to distrain.—The right to distrain may be made conditional, or may be postponed by the contract of the parties (*e*). Where a lessee agreed to take, and the lessor to let, a house and premises at a yearly rent, payable quarterly, and the lessor agreed to complete the house and fix a bresummer in the window, and allow the lessee 15*l.* towards erecting an oven, and the lessee took possession and built the oven, but the lessor never completed the house nor fixed the bresummer, and the lessee refused payment of the rent, whereupon the lessor distrained, it was held that the distress was illegal, as the condition upon which the rent was to become due remained unaccomplished (*f*). And where an oral agreement was entered into for the letting and hiring of a house and furniture at an annual rent, payable quarterly, the house to be furnished completely, in a manner suitable to a ladies' school, and the lessee took possession, it was held that the furnishing of the house by the lessor in the manner agreed upon was a condition precedent to his right to distrain for the rent (*g*). Whenever a covenant or promise to pay rent is conditional and dependent, and the lessor is ready and willing to fulfil the condition on his part, but the lessee prevents him, the lessor will have his power of distress.

(*a*) *M'Leish* v. *Tate*, Cowp. 783.

(*b*) *Knight* v. *Bennett*, 11 Moore, 222; 3 Bing. 361; *Cox* v. *Bent*, 2 M. & P. 281; 5 Bing. 185.

(*c*) *Yeoman* v. *Ellison*, L. R. 2 C. P. 681; see *Morton* v. *Woods*, *ante*, p. 306.

(*d*) *Haines* v. *Welsh*, L. R. 4 C. P. 91; see 33 & 34 Vict. c. 35, "The Apportionment Act, 1870."

(*e*) *Giles* v. *Spencer*, 3 C. B. N. S. 253; 26 Law J. C. P. 237.

(*f*) *Regnart* v. *Porter*, 5 M. & P. 370.

(*g*) *Mechelen* v. *Wallace*, 7 Ad. & E. 54, n.

Distress for rent payable in advance (*h*)—*Rent when due—Several demises.*—Rent may be made payable in advance, so as to entitle the landlord to distrain for it at the commencement instead of at the end of each quarter (*i*). When there is a reservation of an annual rent, or a covenant or agreement by a tenant to pay so much a-year, a stipulation for the determination of the tenancy at the expiration of any one quarter of a year, by a six or three months' notice, will not raise a presumption that the rent was to be paid quarterly (*k*). Where a landlord agreed to let a house at a yearly rent of 50*l*., and likewise the stable and loft at a further rental of 25*l*. per annum, to be paid on the usual quarter-days, it was held that this was a demise of two different sets of premises at separate rents, payable at different periods; that the 50*l*. rent was payable yearly, and the 25*l*. rent payable quarterly (*l*). Where a contract was entered into for the letting and hiring of a house for a year certain, at a rent payable quarterly, "or half-quarterly if required," and the tenant entered into possession, and paid his rent quarterly for the first year of the tenancy, at the expiration of which period the lessor, without any previous demand or notice to the tenant, distrained for half a quarter's rent then alleged to be due, it was held that the lessor had no right so to do without giving a previous intimation and notice to the tenant of his election to take the rent half-quarterly (*m*).

If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and after a seizure has been made, he may rescue his goods at any time before they have been impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*n*).

Distress after the termination of the term of hiring.—At common law the landlord could not, it seems, have distrained after the expiration of the term for rent that accrued due before the termination thereof, as his reversion was then gone, the entire estate being revested in him in possession (*o*), but now, by 8 Anne, c. 14, ss. 6, 7, it is enacted, that it shall be lawful for him to distrain for arrears of rent due upon any lease ended or determined after the determination of the lease in the same manner as he might have done if such lease had not been ended or determined; provided such distress be made within six calendar months after the determination of the lease, and during the continuance of the

(*h*) See *De Nicholls* v. *Saunders*, *post*, p. 312.

(*i*) *Lee* v. *Smith*, 9 Exch. 665.

(*k*) *Collett* v. *Curling*, 10 Q. B. 785; 16 Law J. Q. B. 390.

(*l*) *Coomber* v. *Howard*, 1 C. B. 440.

(*m*) *Mallam* v. *Arden*, 3 M. & Sc. 795; 10 Bing. 299.

(*n*) 1 Inst. 47b., 161a; Gilbert on Distress, 61.

(*o*) *Williams* v. *Stiven*, 9 Q. B. 14; 15 Law J. Q. B. 321.

landlord's title or interest, and during the possession of the tenant from whom such arrears became due. *Primâ facie*, therefore, the executors or other personal representatives of a tenant could not be distrained upon. But the Court of Queen's Bench has held a distress to be good during the possession of the executors, when the tenancy was not determined by the death of the tenant (*p*). Where, however, there is no possession by any one who can be said to be the representative of the tenant, and the tenancy is determined by the death of the tenant, the statute of Anne does not apply, and there is no power to distrain (*q*). Where a tenant went away, leaving behind him a cow and a few pigs, without asking permission to leave them, or saying when he was going to take them away, and the succeeding tenant entered and took possession, it was held that the lessor had no right to distrain the things so left, as the tenant was not then in the possession and occupation of the premises (*r*). The customary right of the tenant to an away-going crop always operates as a prolongation of the term as to the land on which the crop grows for the period allowed by the custom for getting in and gathering the crop. All the rights and properties belonging to the original contract are continued during the period in question, and among them the landlord's right to distrain. Therefore, where a part of the tenant's corn remained in a barn on the demised premises beyond the period of six calendar months, but within the term allowed by custom for the outgoing tenant to get in and dispose of his crop, it was held that the corn might be distrained by the landlord (*s*).

If, by the tacit consent of the landlord and tenant, the contract between them continues beyond the time for which they originally contracted, all the rights and properties belonging to the original contract are also continued, and among them the landlord's right to distrain. It has often been determined that if there be a lease, and after the determination of it, the tenant holds over, with the consent of the landlord, he must hold upon the terms, and is liable to all the conditions and covenants of the lease (*t*). If, after the determination of a tenancy by the expiration of a notice to quit the tenant holds over, and the landlord distrains for rent, the landlord thereby waives the notice, and affirms and continues the tenancy (*u*).

Distress by agents—Joint tenants—Tenants in common, &c.

(*p*) *Braithwaite* v. *Cooksey*, 1 H. Bl. 465.

(*q*) *Turner* v. *Barnes*, 31 Law J. Q. B. 170; see 33 & 34 Vict. c. 35.

(*r*) *Taylerson* v. *Peters*, 7 Ad. & E. 110; 2 N. & P. 622.

(*s*) *Beavan* v. *Delahay*, 1 H. Bl. 9; *Lewis* v. *Harris*, *ib.* 7, n. (*a*); *Nuttall* v. *Staunton*, 4 B. & C. 51.

(*t*) *Beavan* v. *Delahay*, 1 H. Bl. 9; *ante*, p. 307.

(*u*) *Zouch* v. *Willingale*, 1 H. Bl. 311.

A mere receiver of rents (not being a receiver appointed by the Court of Chancery) has no power to distrain, although he may be authorised to collect and receive the rents for his own benefit (x). And when an agent or bailiff receives a special authority from the lessor to levy a distress upon the demised premises, the authority should be given and acted upon in the name of the lessor or reversioner. But if the agent distrains in his own name, and gives a notice in writing, stating the rent to be due to himself, he may, nevertheless, justify in the name and as the bailiff of the lessor. A person beneficially interested in the demised premises may use the name of the owner of the legal estate to levy a distress. The cestui que trust, therefore, may distrain in the name of the trustee, and a mortgagor, in certain cases, in the name of the mortgagee (y). A receiver appointed by the Court of Chancery has a power of distress, and need not previously apply to the Court for a particular order for that purpose (z). One joint-owner or joint-reversioner may distrain alone, but he must, it seems, avow and justify the taking of the distress in his own right, and as bailiff to the other (a). He may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, unless the others expressly dissent (b). The same rule prevails in the case of co-parceners and co-heirs in gavel-kind, any one of whom may avow and justify the distress in his own right, and make conusance as the bailiff of the others without averring or showing any express authority from them to distrain (c). If one of several joint tenants of the reversion to which the rent is incident conveys away all his estate and interest in the demised premises, the right to distrain for the rent is extinguished, for there can be no apportionment of the rent by the severance of the reversion (d). The payment of rent in advance to a landlord mortgagor, unless by agreement the tenant is bound to do it, is not valid as against mortgagees, who may consequently distrain for it (e).

Tenants in common who have several estates, and are severally entitled to the rent and the reversion of the demised premises, should make several distresses. They may, of course, authorize a bailiff to distrain on behalf of all, or one tenant in common may distrain on his own account, and as the bailiff and agent of others, but they must avow and justify the taking of the distress separately

(x) *Ward* v. *Shaw*, 2 M. & Sc. 756; 9 Bing. 608.

(y) *Trent* v. *Hunt*, 9 Exch. 14; 22 Law J. Exch. 320; *Snell* v. *Finch*, 32 Law J. C. P. 177; 13 C. B. N. S. 651.

(z) *Brandon* v. *Brandon*, 5 Madd. 473; *Bennett* v. *Robins*, 5 C. & P. 379.

(a) *Pullen* v. *Palmer*, 5 Mod. 73, 150, 3 Salk. 207.

(b) *Robinson* v. *Hoffman*, 1 M. & P. 474; 4 Bing. 562; 3 C. & P. 234.

(c) *Leigh* v. *Shepherd*, 5 Moore, 297; 2 B. & B. 465.

(d) *Staveley* v. *Allcock*, 16 Q. B. 636; 20 Law J. Q. B. 321.

(e) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589; *Cook* v. *Guerra*, L. R. 7 C. P. 132.

in respect of their several shares (*f*). And one tenant in common may distrain for his own share of the rent, although the rent has been reserved in one sum payable to all generally, and not in several sums payable to each; and therefore, where a lessee holding under two tenants in common, at a yearly rent of 18*l*., payable quarterly, received notice from one of them to pay to him a moiety of the rent as soon as it became due, and the lessee, notwithstanding such notice, paid the whole rent to the other tenant in common, it was held that the one who had thus given the notice might distrain upon the land for his moiety of the rent (*g*). Where fifty acres of arable land were demised by four persons (whose original title did not appear) at one entire rent of 94*l*. per annum, to be divided and paid to the four lessors separately in equal portions, it was held that as between themselves and the lessee they must be taken to be tenants in common of the reversion, and that one of the four was entitled to distrain for a fourth part of the rent independently of the rest (*h*)

Distress by executors and administrators.—By 3 & 4 Wm. 4, c. 42, ss. 37, 38, the executors and administrators of a lessor or landlord may distrain upon lands demised for any term or at will for arrearages of rent due to such lessor or landlord in his lifetime.

Agreements not to distrain.—The right to distrain may be waived, abandoned, or postponed by the express contract or agreement of the landlord, for it is not an inseparable incident to a rent service (*i*). If, therefore, a landlord has agreed with the owner of cattle not to distrain them if they are put into a particular close, and they are afterwards distrained there by the landlord, in violation of his agreement, an action for a trespass in taking the cattle is maintainable against him (*k*).

Acceptance of a bill or note by way of payment.—A landlord is not deprived of his right to distrain by taking a bill, or note, or other security for the rent, unless it be proved that the landlord, at the time he accepted the security, bound himself not to distrain (*l*), or unless it be proved that the note was paid at maturity (*m*). If the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and pays over the amount of the note to the landlord, and the note is subsequently dishonoured, the landlord may return the money to the bailiff or

(*f*) Litt. sec. 314–317.
(*g*) *Harrison* v. *Barnby*, 5 T. R 246.
(*h*) *Whitley* v. *Roberts*, McL. & Y. 107.
(*i*) *Giles* v. *Spencer*, 3 C. B. N. S. 244; 26 Law J. C. P. 237.
(*k*) *Horsford* v. *Webster*, 1 C. M. & R. 699, *Welsh* v *Rose*, 6 Bing 638; 4 M. & P. 490
(*l*) *Davis* v, *Gyde*, 2 Ad & E. 626; see *Bramwell* v. *Eglinton*, 33 Law J. Q. B. 130
(*m*) *Harris* v. *Shipway*, Bull, N. P. 182, a

treat it as an advance or loan from him, and distrain again for the unpaid rent (*n*).

Tender of rent before distress renders the distress wrongful *ab initio*. If, therefore, after a broker has received a warrant of distress, but, before it is executed, the rent is tendered, the right to distrain is gone (*o*).

Time, mode and place of distraining.—The tenant has the whole day on which the rent becomes due to pay such rent, and a distress therefore cannot be made until the day after the day appointed for the payment of the rent (*p*). A landlord or his bailiff cannot lawfully break open gates, or break down inclosures, or force open the outer door of any dwelling-house or building (*q*), or even enter by a window which is shut but not fastened (*r*), in order to make a distress, but he may enter by a door which is shut but not fastened, for that is the ordinary method of entry, and a person who leaves his door unfastened implies a licence to any one who has business to enter the premises, and so he may draw a staple or undo fastenings which are ordinarily opened from the outside of the house (*s*), or perhaps enter by an open window (*t*). A distress, moreover, cannot be made after sunset, or before sunrise (*u*); nor upon land which does not form part or parcel of the demise, and from which the rent reserved does not issue, unless the goods of the tenant have been removed thereto from the demised premises within sight of the lord coming to distrain, or unless they have been fraudulently removed thereto by the tenant to avoid the distress. If, therefore, a tenant enjoys an easement over, or a right to use, the land of a third person, and has, in the *bonâ fide* exercise of such right, placed his goods and chattels on the land of such third person, the lessor has no right to distrain them there. Thus, where a wharf on the banks of a tidal river was demised to a tenant at an annual rent, with a right to use part of the bed of the river, between high and low-water mark, as a place of deposit for boats and barges resorting to the wharf, it was held that the lessor of the wharf had no right to distrain the barges of the tenant lying on such land and bed of the river alongside the wharf, although they were attached to the wharf by head and stern-ropes, inasmuch as the land on which the barges were lying belonged to the crown, and had never been demised to the

(*n*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 Law J. Exch. 291.

(*o*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 Law J. Exch. 224.

(*p*) 21 Hen. 6, 40; *Duppa* v. *Mayo*, 1 Saund. 287.

(*q*) *Brown* v. *Glenn*, 16 Q. B. 254; 20 Law J. Q. B. 205.

(*r*) *Nash* v. *Lucas*, L. R. 2 Q. B. 590.

(*s*) *Ryan* v. *Shilcock*, 7 Exch. 72; 21 Law J. Exch. 55.

(*t*) *Nixon* v. *Freeman*, 5 H. & N. 647.

(*u*) Co. Litt. 142a; Gilbert on Distress, 50; *Tutton* v. *Darke*, 5 H. & N. 654; 29 Law J. Exch. 271.

tenant (*x*). For the same reason a landlord could not, by the common law, distrain the beasts and cattle of a tenant feeding upon a common, and which had been placed there by the tenant in the *bonâ fide* exercise of a right of common vested in him in his own right, or as appurtenant to the land demised to him by the lessor. But this has been altered by 11 Geo. 2, c. 19, s. 8, which empowers landlords to take and seize, as a distress for arrears of rent, any cattle or stock of their tenants feeding or depasturing upon any common appendant or appurtenant. By the terms of the lease, however, a right to distrain upon other lands may be given (*y*).

Things not distrainable.—Tenants' fixtures annexed to the freehold by nails and permanent fastenings, such as furnaces, chimney-pieces, kitchen-ranges, stoves, coppers, grates, blinds, &c., are not distrainable, as they cannot be removed and restored without sustaining some injury (*z*). But if they are attached to the freehold by bolts and screws, so as to be moveable, they may be distrained and taken. Therefore cotton-spinning machines fixed to a wooden floor by screws, or soldered to a stone flooring, but fastened so as to be readily removeable, are distrainable (*a*). A millstone in a mill, and an anvil in a smith's shop, however, cannot be distrained for rent, although the anvil be removed out of the stock, or the millstone out of the socket to be picked, for the anvil is accounted part of the forge, and the millstone part of the mill, though when taken it is not actually affixed to the freehold (*b*). Tramplates and sleepers of a railway merely laid upon the ground, although they have become indented in the soil by user, are distrainable (*c*); but if they have been packed in ballast, so that they cannot be removed without making holes in the ballast, they are not (*d*).

By 52 Hen. 3, stat. 4, it is provided that no man of religion, nor other person, shall be distrained by his beasts that profit his land, nor by his sheep, by the king's or other bailiffs, so long as they can find other distress, or other chattels sufficient for the levying of the distress. Beasts of the plough are by common law exempt from distress; but to render other animals exempt on the ground that they profit the land, within the above statute, it is not enough to show that they are occasionally used in manuring the soil: it must be proved that they have been broken to harness, and

(*x*) *Buszard* v. *Capel*, 8 B. & C. 141; 3 M. & P. 494; 6 Bing. 150.

(*y*) *Daniel* v. *Stepney*, L. R. 9 Ex. 185, C. A.

(*z*) Co. Litt. 47b; *Pitt* v. *Shew*, 4 B. & Ald. 207; *Darby* v. *Harris*, 1 Q. B. 898; *Dalton* v. *Whitten*, 3 Q. B. 961.

(*a*) *Hellawell* v. *Eastwood*, 6 Exch. 309; 20 Law J. Exch. 155; see *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Holland* v. *Hodgson*, L. R. 7 C. P. 328.

(*b*) Bro. Abr. DISTRESS, pl. 23.

(*c*) *Beaufort* (*Duke of*) v. *Bates*, 3 De G. F. & J. 381; 31 L. J. Ch. 481.

(*d*) *Turner* v. *Cameron*, L. R. 5 Q. B. 306.

are regularly employed in ploughing, harrowing, or drawing carts or waggons upon the farm, in the ordinary cultivation of the land. Heifers and steers, therefore, and young colts not broken to harness, are not "beasts that profit the land" within the meaning of the statute. Sheep, also, are exempt from distress at common law, independently of the statute, so long as there are other distrainable chattels and animals, not being beasts of the plough, sufficient to satisfy the rent (*e*).

Implements of husbandry are also exempt from distress, and so are the tools and instruments of a man's trade or profession, such as the books of the scholar, the axe of the carpenter, the anvil of the smith, the stocking-loom of the weaver, the threshing-machine of the farmer, and the spade and axe of the labourer, so long as they are in actual use, or there are other goods on the demised premises sufficient to satisfy the rent without them (*f*). Wearing apparel, also, in actual use about the person of the wearer, is not distrainable, whether it be the wearing apparel of the tenant himself or of a guest in his house (*g*).

Perishable articles, growing crops, fruit, money, &c., have always been considered to be unfit to be taken and detained as a pledge for rent, inasmuch as they are liable to rapid deterioration, and cannot be restored to the tenant in as good plight as they were in when taken, within the period allowed by law for their redemption. Therefore fruit, milk, the flesh of animals recently slaughtered (*h*), and other things of a perishable nature, could not be distrained; but as the 2 W. & M. c 5, s. 3, directs the distress to be sold within five days unless replevied, perhaps the ancient rule of the common law with respect to the perishable nature of the distress no longer extends, in the case of a distress for rent, to anything which is not liable to deterioration within the period prescribed by the statute for the sale of it. As the things distrained were regarded at common law in the light of a pledge, to be returned to the tenant when the rent was paid, it was held that money could not be distrained unless in a bag, because the identical pieces could not be known and restored: and that grain or flour could not be taken out of a sack, or hay from a barn, because it could not well be ascertained whether the identical quantity taken had been returned. Corn in the sheaf was not distrainable unless found in a cart. Growing corn, grass, fruits, hops, roots, and growing produce, also, were not distrainable, as the crop was

(*e*) *Keen* v. *Priest*, 4 H. & N. 236; 28 Law J. Exch. 157.

(*f*) *Simpson* v. *Hartropp*, Willes, 512; *Wood* v. *Clarke*, 1 Cr. & J. 484; *Harvey* v. *Pocock*, 11 M. & W. 740; Co. Litt. 47a; *Nargatt* v. *Nias*, 28 Law J. Q. B. 143.

(*g*) Bac. Abr INNS, B.

(*h*) *Morley* v. *Pincombe*, 2 Exch. 101.

attached to the freehold, and could not be taken up and returned to the tenant, in case he chose to redeem the pledge, in the same state and condition as it was in when removed (*i*). But the 2 W. & M. sess. 1, c. 5, s. 3, and 11 Geo. 2, c. 19, ss. 8 and 9, now enable the lessor to distrain loose corn and corn in the sheaf, straw and hay, growing corn, grass, hops, roots, fruit, pulse, and growing produce generally. These Acts, however, do not extend to trees, shrubs, and plants growing in nursery gardens, nor to money (*k*).

Property of strangers on the demised premises in their own possession.—The landlord has no right to distrain the carriage and horses of a morning visitor standing at the door of the tenant's dwelling-house, or under a shed upon the demised premises; or the horse of a stranger who has called at the house on business, and tied up the animal to the gate or the stable-door. He cannot distrain a horse which has brought corn to be ground at the tenant's mill, and has been fastened to the mill-door whilst the corn was being ground to be taken back, nor a horse which has brought yarn to a private weighing machine belonging to the tenant to be weighed, and has been placed in a stable on the demised premises whilst the weighing was accomplished; the horse in each of these cases being in the possession and use, and under the control, of the owner or his servant (*l*). Neither can the landlord distrain the boat or barge of a third person lying in a private dock or private canal, or alongside a wharf upon the demised premises, provided such boat or barge is in the hands and under the care of the master and crew of the owner, and is at the time employed in the owner's business, and in his use and possession, and not in the use and possession nor under the control of the tenant; but if it is abandoned, and left upon the premises, in the possession or use, or under the care of the tenant or his servants, then it is distrainable (*m*).

The goods and chattels and wearing apparel of a guest in the tenant's house, in the actual possession and use of such guest, cannot be distrained for rent, whether the house in which the guest is lodged is a private dwelling-house or a common inn; nor the goods and chattels of third persons placed upon the demised premises, in the possession and under the care of the tenant, in the ordinary course of trade; nor the goods and chattels, horses and carriages of travellers, deposited in hostelries and public stables, or in a market or fair where things are taken to be bought or sold; nor goods delivered to a carrier to be carried

(*i*) 1 Roll. Abr. 667; Bradby on Distress, 213; Gilbert on Distress, 32.

(*k*) *Clark* v. *Gaskarth*, 2 Moore, 491.

(*l*) *Read* v. *Burley*, Cro. Eliz. 596.

(*m*) *Muspratt* v. *Gregory*, 3 M. & W. 677.

for hire. The horse in the smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c., in the hostelry, nor the materials in the weaver's shop for the making of cloth, or cloth or garments at a tailor's, nor sacks of corn nor meal in a mill, nor in a market, for it is in custody (protection) of law (*n*).

Property of strangers placed on the demised premises, if placed there with the leave and licence of the landlord, is not distrainable. If, for example, the landlord's permission to place cattle on the demised premises has been sought for and obtained, and the beasts are placed thereon with his authority, he is held impliedly to have undertaken not to exercise his power of distress as against them (*o*) By 34 & 35 Vict. c. 79, if the goods of a lodger are taken as a distress by the superior landlord, the lodger may make and serve upon the landlord or his bailiff a declaration that such is the fact, accompanied by a correct inventory of the goods, and a tender of the rent, if any, which the lodger then owes to the tenant, and if after service of such declaration and inventory the landlord proceeds with the distress, he will be guilty of an illegal distress, and liable to an action at law at the suit of the lodger. The lodger may also apply to a magistrate for an order for the restoration of the goods. "By 35 & 36 Vict. c. 50, the rolling stock of a railway company at any works to which there is a railway siding, which rolling stock is not the property of the tenant of such works, is exempt from distress, if marked with the name or brand, &c., of the actual owner."

Materials placed on the demised premises to be manufactured or worked upon.—The goods and chattels of third persons placed on the demised premises for trading or manufacturing purposes are, by the policy of the law, exempt from distress; such as the yarn of a stocking-manufacturer, placed in the house of the tenant, a stocking-weaver, to be woven into stockings, but not the frame or machinery of the manufacturer, delivered to the weaver to enable him to weave the yarn (*p*); also the silk of a velvet-manufacturer, delivered to a tenant, a silk-weaver, and taken home by him to be made into velvet at his own house (*q*); bullocks sent to a slaughterer or carcase-butcher, to be slaughtered and cut up in the way of his trade, and sent back in joints to the owner to be sold or consumed (*r*); corn sent to a miller to be ground; clothes sent to a tailor's, casks sent to a cooper's, or

(*n*) 7 Hen. 7, 1b.; Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 688, pl. 12, Co. Litt. 47a; *Gisbourn* v. *Hurst*, 1 Salk. 249.

(*o*) *Joyce* v. *Fowkes*, 2 Vern. 129; *Horsford* v. *Webster*, 1 C. M. & R. 696; *Giles* v. *Spencer*, 3 C. B. N. S. 253.

(*p*) *Wood* v. *Clarke*, 1 Cr. & J. 484.

(*q*) *Gibson* v. *Ireson*, 3 Q. B. 39.

(*r*) *Brown* v. *Shevill*, 2 Ad. & E. 138.

boats to a boat-builder, to be repaired; goods sent to a weigher to be weighed, or to an auctioneer, commission-agent, factor, warehouseman, granary-keeper, wharfinger, or other agent, to be sold or exported, or otherwise to be dealt with in the course of trade (s). And so of goods in the possession of a pawnbroker as security for money advanced (t). "The principle of the exemption," observes Parke, B., "is the public good; that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades or businesses for the benefit of all indiscriminately; or buy or sell in markets or fairs, and thus supply themselves with the commodities of life" (u). The privilege of goods delivered to an auctioneer is confined to goods on his premises, and does not extend to goods sold on the premises of the owner (x).

Property of guests at a common inn cannot be distrained for the rent of the inn, for it would be a sore detriment to travellers and wayfarers who are obliged by necessity to resort to common inns, if their goods and effects were liable to be seized and sold in case of non-payment of the rent of the inn (y).

Chattels in the custody of the law are not distrainable.— Goods and chattels which have been actually seized under a *fi. fa.* or taken under an attachment, and are in the possession of a sheriff's officer or bailiff, cannot be distrained for rent, as they are in the custody of the law (z), but if the landlord is beforehand with the sheriff, and puts in a distress before the sheriff's officer has got possession, the sheriff cannot then seize them. The landlord is entitled to distrain for six years' arrears of rent (a), and if he gets possession before the sheriff he is entitled to retain and sell, and satisfy the whole six years' arrears if they be due.

If growing crops have been taken in execution and sold by the sheriff, such crops, as long as they remain on the demised premises, are liable to be distrained for rent accruing due subsequently to the execution and sale (14 & 15 Vict. c. 25, s. 2), in default of sufficient distress of the goods and chattels of the tenant; and if the execution is fraudulent (b), or the sheriff's officer, after the seizure of the goods, relinquishes the possession, and leaves no one in possession of them, then they may be distrained and taken (c).

(s) Bac. Abr. DISTRESS, B.; *Williams* v. *Holmes*, 8 Exch. 861; *Adams* v. *Crane*, 1 C. & M. 380; *Brown* v. *Arundel*, 10 C. B. 54; *Gilman* v. *Elton*, 6 Moore, 243; *Thompson* v. *Mashiter*, 8 Moore, 254; *Matthias* v. *Mesnard*, 2 C. & P. 353; *Miles* v. *Furber*, L. R. 8 Q. B. 77.

(t) *Swire* v. *Leach*, 34 L. J. C. P. 150.

(u) *Joule* v. *Jackson*, 7 M. & W. 451.

(x) *Lyons* v. *Elliot*, 1 Q. B. D. 210.

(y) Bro. Abr. DISTRESS, pl. 57, 71; 1 Roll. Abr. 68, pl. 12.

(z) *Wharton* v. *Naylor*, 12 Q. B. 673.

(a) *Humfrey* v. *Gery*, 7 C. B. 567.

(b) *Smith* v. *Russell*, 3 Taunt. 400; *St. John's College* v. *Murcott*, 7 T. R. 263.

(c) *Blades* v. *Arundel*, 1 M. & S. 713.

The landlord is entitled, in some cases, to a year's rent, and in other cases to four weeks' arrears of rent, before goods taken in execution by the sheriff or the officers of the county court can be removed from the premises (*d*).

Statutory exemption from distress in favour of foreign ambassadors, and public companies in liquidation.—It is enacted by 7 Anne, c. 12, s. 3, on grounds of public policy, that process of distress against the goods of any ambassador, or other public minister of a foreign state, or of his domestic servants, shall be void.

By the 25 & 26 Vict. c. 89, s. 163, it is enacted that where any company is being wound up by the court, or subject to the supervision of the court (of Chancery), any attachment, distress, execution, &c., put in force against the estate and effects of the company after the commencement of the winding-up, shall be void to all intents (*e*). And the 87th section provides that after a winding-up order, no suit, action, or other proceeding shall be commenced or proceeded with against the company without the leave of the court. However, if a company, being equitable owner of a lease, continues in occupation after a winding-up order, the landlord is not prevented by ss. 87 or 163 of the above Act from distraining upon the goods of the company for rent accrued since the winding-up (*f*).

Things distrainable.—Chattels of traders left on the demised premises in the possession of the tenant.—If a trade can be carried on with profit and advantage, without the things used in the trade being left on the demised premises in the custody and possession of the tenant, they are not there *ex necessitate*, and are consequently distrainable. Thus it has been held that if a brewer's casks be left with a publican until the beer is consumed, the casks do not fall within the exemption, and are not privileged from distress, inasmuch as it is nowise essential to the carrying on the trade of the publican, that the brewer should find the casks (*g*). So, if the barge of a purchaser of salt is left at the salt-works in the possession of the vendor of the salt, it is distrainable for rent, inasmuch as "it is not necessary for the protection of trade that the boat should be delivered into the custody of the person manufacturing and selling salt. The trade may well be carried on at the salt-works without the possession of the boat being at all parted with by the owner." Upon the same principle it has been

(*d*) As to this, and as to Distress by Bailiffs of the County Court, see Add. on Torts, 5th ed. by Cave, p. 639.

(*e*) See *Re Progress Assurance Co.*, L. R. 9 Eq. Ca. 370.

(*f*) *Re Lundy Granite Co.*, L. R. 6 Ch App. 462; whether the leave of the Court is necessary, *quære*; *S. C.*

(*g*) *Joule* v. *Jackson*, 7 M. & W. 451.

held that a farmer's cart which has brought malt to a brewer, and has been left in the brewer's yard in the possession of the brewer, or his servant, to be loaded with a return cargo of grains, or beer, is distrainable for the rent of the brewing premises (*h*).

If a carriage which has been sent to a coach-maker to be repaired is left on the premises after the repairs have been completed, for purposes foreign to the trade of a coach-maker, it is distrainable, unless the coach-maker exercise some other trade thereon, and the carriage is left with him for the purpose of being dealt with by him in the exercise of such trade. If he exercises the trade of a commission agent for the sale of coaches and carriages, as well as the trade of a coach-maker, and the carriage is left with him to be sold, it would then come within the principle of the exemption (*i*). It has been held that a carriage standing at livery is distrainable (*k*). Whenever a chattel, such as a threshing-machine, or a loom, found upon the demised premises, has been lent or let by the owner to the tenant, it is distrainable, if not in actual use at the time of the levying the distress (*l*). There is a decision to the effect that cattle on their way to market in charge of a drover, and turned into a close on the demised premises in the night, are distrainable (*m*), but this decision appears to be directly at variance with numerous authorities, and with the principles established for the benefit of trade, and cannot now be considered law (*n*).

With the exception of fixtures, perishable articles, and things used in trade or placed on the demised premises for trading or manufacturing purposes, or standing there in the custody or possession of the owner, as previously mentioned (*ante*, pp. 315, 316), all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable for the rent due from such premises. This is the case with the horses and carriages of strangers standing at livery on the demised premises, and not being at the time of the distress under the charge or in the possession of the owner or his servants (*o*).

Distress of chattels mortgaged by the tenant.—Where a tenant from whom rent was due assigned all his goods and chattels by a registered bill of sale by way of mortgage, and was left in possession of the mortgaged chattels, and the landlord distrained them for

(*h*) *Muspratt* v. *Gregory*, 3 M. & W. 677.
(*i*) *Findon* v. *M'Laren*, 6 Q. B. 891.
(*k*) *Francis* v. *Wyatt*, 3 Burr. 1498; 1 W. Bl. 483; *Parsons* v. *Gingell*, 4 C. B. 545.
(*l*) *Fenton* v. *Logan*, 3 M. & Sc. 82; *Gorton* v. *Falkner*, 4 T. R. 565.
(*m*) *Fowkes* v. *Joyce*, 3 Lev. 260; 2 Ventr. 50.
(*n*) *Tate* v. *Gleed*, 2 Saund. 290a; see also per Mellor, J., in *Miles* v. *Furber*, L. R. 8 Q. B. 77; 42 L. J. Q. B. 41.
(*o*) *Parsons* v. *Gingell*, *supra*.

rent, and caused them to be appraised, and removed to an auction-room to be sold, and the mortgagee, before the sale, and whilst the goods were in the custody of the law, gave notice to the landlord of the mortgage, and required the landlord to deliver to him, the mortgagee, any goods that might remain after the landlord had sold enough to satisfy the distress and costs, and the landlord promised so to do, and part of the goods remained unsold, and the landlord carried them back to the demised premises and returned them to the custody and possession of his tenant, from whom he took them, taking no heed of the notice given him by the mortgagee, or of his promise to return the goods to the latter; it was held that the landlord was not liable to an action at the suit of the mortgagee, as it did not appear that he had been guilty of any tortious act, or that the mortgagee had sustained any damage in respect of the removal of those goods which had been taken away from and returned to the mortgagor, in whose possession the mortgagee had left them, and which were as much subject to the provisions of the bill of sale after their return as they had been before they were taken away (*p*).

If, after the tenant has mortgaged the goods and chattels on the demised premises, the mortgagee enters and takes possession, and the tenant becomes bankrupt, owing more than a year's rent, and the landlord distrains, he is entitled to make the distress available for the whole rent due to him, as the Bankrupt Act was never intended to favour the mortgagee at the expense of the landlord (*q*).

Things distrainable under a licence to distrain.—If a debtor gives his creditor a licence to enter upon the debtor's land and distrain all the goods and chattels upon the debtor's premises (*r*), and sell them in satisfaction and discharge of the debt, this will not enable the creditor to seize and sell the property of a stranger, for a licence of this sort cannot be made to extend to and to bind those who are not parties to it (*s*). If, therefore, the occupier of a farm borrows money, and binds himself to pay interest, and covenants that if the interest should be in arrear for a certain time, the covenantee shall have power to enter upon the farm and distrain for the arrears in the same manner as landlords may distrain for rent, this will be a licence to the covenantee to enter and seize all the goods on the premises then belonging to the covenantor, but

(*p*) *Evans* v. *Wright*, 2 H. & N. 527; 27 Law J. Exch. 50.

(*q*) *Brocklehurst* v. *Lawe*, 7 Ell. & Bl. 185, 26 Law J. Q. B. 107; the 129th section of the old Act (12 & 13 Vict. c. 106), under which this case was decided, and the 34th section of the present Act (32 & 33 Vict. c. 71) are substantially the same.

(*r*) As to after-acquired property, see *Reeve* v. *Whitmore*, 32 Law J. Ch. 497.

(*s*) *Howes* v. *Ball*, 7 B. & C. 481.

will not enable him to take the goods of a stranger (*t*). A licence to seize chattels is a mere personal authority, to be exercised by the licensee, and cannot be granted over or assigned to another (*u*).

The grantee of a rent-charge, with power of distress, may justify the taking corn, &c., in a stack or in trusses, under the 2 Wm. & M., sess. 1, c. 5 (*ante*, p. 317), in the same way as a landlord under a distress for rent; also the taking of the goods of a stranger on the premises charged with the rent. If the plaintiff whose goods have been taken held under a demise prior to the rent-charge, he ought to reply that fact (*x*).

Distress and seizure of things fraudulently removed.—By 11 Geo. 2, c. 19, s. 1, it is enacted, that if any tenant of any lands or tenements, upon the demise or holding whereof any rent is reserved, shall fraudulently or clandestinely convey away from the demised premises his goods or chattels, to prevent the landlord from distraining for arrears of rent, it shall be lawful for the landlord, or any person by him for that purpose lawfully empowered, within thirty days next ensuing the carrying away of the goods, to seize the same wherever they shall be found, as a distress for the rent, and sell and dispose of them as if they had been actually distrained upon the demised premises, provided (s. 2) they have not, before the seizure, been sold *bonâ fide* and for a valuable consideration to a person ignorant of the fraud. Where the goods have been placed in any building or inclosure locked or fastened, the landlord, his bailiff or agent, first calling to his assistance a constable or peace-officer, &c., may in the daytime break open the building and seize the goods; but, before breaking open a dwelling-house, oath must be made (s. 7), before a justice of the peace, that there is reasonable ground to suspect that such goods and chattels are in the dwelling-house (*y*).

If it appears that rent was due at the time of the removal of the goods, and that the goods were taken away on or after the day the rent became due, for the purpose of putting them out of reach of a distress, the removal is a fraudulent removal within the meaning of the statute (*z*).

If, therefore, goods are removed on quarter-day, they may be followed, though the rent is not in arrear, and there is no right to distrain until the day after (*a*). But if the rent is not due, or there is sufficient distress on the demised premises, independently

(*t*) *Freeman* v. *Edwards*, 2 Exch. 739.

(*u*) *Brown* v. *Metrop. County Society*, 1 Ell. & Ell. 838; 28 Law J. Q. B 236.

(*x*) *Johnson* v. *Faulkner*, 2 Q. B. 936; as to a distress for tithe rent-charge, see *Ex parte Arnison*, L. R. 3 Exch. 36.

(*y*) As to pleas of justification of the seizure of goods under this statute, see *Williams* v. *Roberts*, 7 Exch. 629.

(*z*) *Opperman* v. *Smith*, 4 D. & R. 33; *Johns* v. *Jenkins*, 1 Cr. & M. 227.

(*a*) *Dibble* v. *Bowater*, 2 Ell. & Bl. 564.

of the goods removed, to satisfy the rent, the removal is not fraudulent, and the lessor cannot consequently follow and distrain the goods (*b*). The statute applies solely to the goods of a tenant, and not to those of a stranger. If, therefore, a lodger removes his goods to prevent them from being distrained for rent due from the tenant whose lodger he is, the landlord cannot follow them and distrain them (*c*). To deter tenants from fraudulently removing their goods to avoid a distress, a penalty to the amount of double the value of the things distrained is imposed upon the offender, which may be recovered by an action of debt, or (if the goods do not exceed 50*l.* in value) by a summary proceeding before two justices (*d*).

What amounts to a distress for rent.—It is not necessary, in order to make a distress for rent, that the lessor or his agent should take corporal possession of the things intended to be distrained. It is sufficient if the lessor, in person or by deputy, enters upon the demised premises and announces to the tenant, or his servants, or the persons in actual occupation of the property, that he detains them for his rent. Thus, where a stranger was about to remove some goods he had deposited on the demised premises, and the lessor, hearing of his intention, came upon the land and declared that he would not suffer the things to be removed until his rent was paid, and then went away, and in the course of the day sent a broker, who made a formal distress, but in the meantime the stranger had removed his property off the demised premises, it was held that the distress was commenced by the landlord's entry and declaration, and that the landlord was justified in retaking the goods at the place to which they had been removed (*e*). So, where the landlord's agent entered upon the demised premises in the absence of the tenant, and told the servants of the latter that he was come to distrain for rent, and walked round the premises, took an inventory, and left his inventory at the dwelling-house, with a notice of distress addressed to the tenant, informing him that he had distrained the goods mentioned in the inventory for rent due to his landlord, it was held that the distress was completed and accomplished by these acts of the agent, and that the subsequent departure of the latter without leaving any one in possession of the things distrained was not an abandonment of the distress (*f*). And where the agent of the lessor went into a field forming part of the demised premises, where the tenant's cattle were grazing, and

(*b*) *Rand* v. *Vaughan*, 1 Sc. 670.

(*c*) *Thornton* v. *Adams*, 5 M. & S. 38.

(*d*) *Horsefull* v. *Davy*, 1 Stark. 169; *Bromley* v. *Holden*, M. & M. 175; *Bach* v. *Meats*, 5 M. & S. 200.

(*e*) *Wood* v. *Nunn*, 2 M. & P. 30; 5 Bing. 10; *Cramer* v. *Mott*, L. R. 5 Q. B. 357.

(*f*) *Swann* v. *Falmouth (Earl of)*, 8 B. & C. 456; 2 M. & Ry. 584.

placing his hand upon one of the beasts, declared that he distrained the whole of them for the rent then due, it was held that this was an actual levying of a distress on all the cattle in that particular inclosure (*g*). But a mere notice by a landlord that he has distrained things which are not distrainable, unaccompanied by any seizure or removal of the goods, will not constitute any cause of action (*h*).

If a warehouse-keeper, who lets out warehouse-room and places of deposit for goods, or receives goods to be warehoused and kept at a certain rent, and has power to distrain the goods in his hands for the warehouse-rent, gives notice to the owner of the goods that he will not deliver certain goods in his warehouse to the order of the latter until the rent due for warehouse-room is paid, and then detains the goods, the detainer and notice amount to a distress for the rent (*i*). Where a lodging-house keeper, to whom rent was due for the hire of furnished apartments, refused to permit the wearing apparel, jewels, and chattels of his tenant to be removed from the apartments, saying that he should detain them until his rent was paid, and the tenant brought an action against him for a conversion of the chattels, it was held that the detainer amounted to a distress for rent, and that the action was not maintainable (*k*). And where a lodging-house keeper, claiming rent to be due to him from his lodger, locked up the goods of the latter in the room which the lodger held, and in which they had been placed by him, and kept the key in his pocket, refusing the lodger access to them, saying that nothing should be removed until his bill was paid, and the lodger brought an action of trespass for a seizure of the goods, it was held that the action was not maintainable (*l*).

Abuse of the right to distrain, rendering persons trespassers ab initio.—If a landlord going to distrain breaks open an outer door, or gets in through a window, and then breaks the door open and seizes the goods in the house, this is not a distress (Add. on Torts, p. 331, 5th ed. by Cave), but a trespass, and he is responsible for all the damage sustained by the tenant (*m*); and if a distress has been lawfully effected in the first instance, but the landlord or his bailiff abuses the distress by using or working horses or animals distrained, he becomes, at common law, a trespasser *ab initio* (*n*); but, by 11 Geo. 2, c. 19, s. 19, where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall

(*g*) *Thomas* v. *Harries*, 1 Sc. N. R. 524.

(*h*) *Beck* v. *Denbigh*, 29 Law J. C. P. 273.

(*i*) *Green* v. *St. Kath. Dock Co.*, 19 Law J. Q. B. 53.

(*k*) *Cotton* v. *Bull*, Easter Term, 1857, C. P.; *Cramer* v. *Mott*, *ante*, p. 324.

(*l*) *Hartley* v. *Moxham*, 3 Q. B. 701.

(*m*) *Attack* v. *Bramwell*, 32 Law J. Q. B. 148.

(*n*) *Oxley* v. *Watts*, 1 T. R. 12; *Six Carpenters' case*, 8 Co. 146a.

be afterwards done by the party distraining, or his agent, the distress shall not be deemed unlawful, nor the distrainor a trespasser *ab initio;* but the party grieved may recover satisfaction for the damage in a special action of trespass, or on the case, at the election of the plaintiff, and if he recover he shall have full costs. This statute, however, does not apply where the original entry was unlawful, and no valid distress has been effected (*o*).

If a distrainor abuses a distress by working an animal distrained, the owner may interfere to prevent it, and an action cannot be maintained against him for pound-breach or rescue (*p*).

Of unlawful distress when no rent was in arrear.—If the lessor distrains before the rent has become due, the tenant may resist the entry and seizure by force, and, after a seizure has been made, he may rescue his goods at any time before they are impounded; but when once the goods have been impounded, they are in the custody of the law, and the tenant cannot then break the pound and retake them (*q*). By the 2 Wm. & M. sess. 1, c. 5, s. 5, it is enacted, that if any person shall distrain for rent pretended to be due or in arrear when no rent was due, the party so distraining shall forfeit double the value of the chattels so distrained and sold, together with full costs of suit.

Excessive distresses.—By the statute of Malbridge, 52 Hen. 3, c. 4, it is enacted, that distresses shall be reasonable and not too great; and that he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses. Lord Coke, in his reading on this statute, observes, that it is worthy of observation "how provident the makers of the statute be that men's beasts, cattell, or goods be not excessively distrained," and that "this agreeth with the reason of the common law" (*r*). It is the duty, therefore, of every person who has by law a right to distrain, to make a fair and reasonable distress; and if there be a breach of that duty, and the landlord distrains goods and chattels beyond what is reasonably and fairly necessary for the purpose of realising the rent and expenses, he renders himself liable to an action for damages at the suit of the tenant, even although the tenant has not, in fact, sustained any damage (*s*). If he distrains the crops growing in two fields, when the crop growing in one would be sufficient, when at maturity, to satisfy the rent and charges, the distress is an excessive distress (*t*). But it is not for every trifling excess that an action is maintainable; it must be

(*o*) *Attack* v. *Bramwell*, *ante*, p. 325.

(*p*) *Smith* v. *Wright*, 6 H. & N. 821; 30 Law J. Exch 313.

(*q*) Gilbert on Distress, 61.

(*r*) 2 Inst. c. 4, p. 107.

(*s*) *Chandler* v. *Doulton*, 34 Law J. Exch. 89.

(*t*) *Piggott* v. *Birtles*, 1 M. & W. 441.

clearly disproportionate and excessive (*u*). And "if there is but one thing which can be taken, so that it must be taken or the party must go without his distress, for taking it no action lies, though it much exceeds the sum for which the distress is taken" (*x*). A distress may be excessive although the goods when sold may not realise enough to cover the rent due and the expenses (*y*). The action may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (*z*); and if the lessee, after the distress, enters into an agreement with the landlord respecting the sale and disposition of such distress, or authorises him to dispense with some or all of the usual forms preparatory to a sale, he does not thereby waive or abandon his right of action for the excessive distress (*a*). The tenant is entitled to recover damages for a wrongful distress, although he had the free use of the goods all the time they were in the constructive custody of the law (*b*).

Distress for more rent than is due.—If a landlord who has distrained, not excessively, for rent in arrear demands a larger sum for arrears than the tenant admits to be due, that alone does not make the detention of the goods by the landlord or his bailiff unlawful. The tenant must be taken to know, that neither the validity of the distress nor of the detainer depends on that demand, and that if he wishes to make the latter unlawful he should tender the sum which he alleges to be really due, together with the costs of the distress (*c*). A declaration, therefore, which alleges that the plaintiff held certain premises as tenant to the defendant at a certain rent, and that the defendant wrongfully seized certain goods of the plaintiff on the demised premises for certain arrears of rent alleged to be due, and afterwards sold the goods for the said arrears, whereas a small part only of the rent claimed to be due was due, discloses no cause of action in the absence of an allegation that the defendant sold more than was enough to satisfy the rent actually due and the costs of the distress (*d*). The distraining of chattels on a claim of more rent being in arrear than is in fact in arrear, and selling them, is not actionable; firstly, because the distrainor for rent is not bound by the amount for which he claims to distrain, and though he takes the distress, alleging that he does so for an amount exceeding the real arrears of rent, he may sell afterwards only for that which is

(*u*) *Roden* v. *Eyton*, 6 C. B. 430.

(*x*) *Field* v. *Mitchell*, 6 Esp. 71.

(*y*) *Smith* v. *Ashforth*, 29 Law J. Exch. 259.

(*z*) *Fisher* v. *Algar*, 2 C. & P. 374; *Bail* v. *Mellor*, 19 Law J. Exch. 279.

(*a*) *Willoughby* v. *Marshall*, 4 D. & R. 539; 2 B. & C. 821.

(*b*) *Baylis* v. *Usher*, 4 M. & P. 790.

(*c*) *Glynn* v. *Thomas*, 11 Exch. 870; 25 Law J. Exch. 127.

(*d*) *Tancred* v. *Leyland*, 16 Q. B. 669; *French* v. *Phillips*, 26 Law J. Exch. 82; 1 H. & N. 564.

really due; secondly, because, from a mere allegation that the distrainor sold for the alleged arrears and costs, it is not to be inferred that he sold more than was necessary to raise the amount of the arrears actually due. If, however, the untrue claim has been followed by a sale of more of the goods taken than was sufficient to raise the amount of rent really in arrear, with the legal charges, then there is a cause of action. It is not enough in an action against a landlord for distraining for more rent than is really due to allege it to have been done maliciously, for an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent (*e*).

Repeated distresses for the same rent.—A landlord cannot lawfully distrain twice for the same rent, unless the distress has been withdrawn at the instance of the tenant, or unless there has been some mistake as to the value of the things taken (*f*); or unless the distress has been rendered abortive by the threats or misconduct of the tenant. If, after a sale of chattels that have been distrained and sold in due course of law, the tenant by force or threats prevents the purchaser from taking the chattels off the land, the landlord may re-enter and distrain again (*g*). And if the landlord's receiver or bailiff relinquishes a distress on receiving a bill or note for the rent from the tenant, and the note is dishonoured when it arrives at maturity, the landlord may, as we have seen, distrain again (*h*).

Impounding the goods—Pound-breach.—The landlord may now impound the things distrained in any barn or building, hovel or rick, or on any fit part of the demised premises (*i*). No formal impounding is required, as in ancient times, in order to remove the goods from the possession and control of the tenant, and place them in the custody of the law. As soon as the distrainer has made out and delivered to the tenant, or has left upon the premises, an inventory of the goods he has taken, they are impounded within the meaning of the statute. Thus, where the landlord distrained four casks of beer in a cellar, and gave the usual notice of the distress to the tenant, and left the casks where he found them in the cellar, without placing them under lock or key, or leaving any person in charge of them, it was held that the casks were duly impounded (*k*). So, where cattle which had been distrained for rent were left in a field on a farm where they were taken, and the gates of the field, which had been properly secured by the broker

(*e*) *Stevenson* v. *Newnham*, 13 C. B. 297; 22 Law J. C. P. 110.

(*f*) *Smith* v. *Goodwin*, 4 B. & Ad. 413; *Bagge* v. *Mawby*, 8 Exch. 649; *Dawson* v. *Cropp*, 1 C. B. 961.

(*g*) *Lee* v. *Cooke*, 2 H. & N. 584; 3 H. & N. 203; 27 Law J. Exch. 337.

(*h*) *Parrott* v. *Anderson*, 7 Exch. 93; 21 Law J. Exch. 291.

(*i*) 2 Wm. & M., sess. 1, c. 5, s. 4; 11 Geo. 2, c. 19, s. 10.

(*k*) *Firth* v. *Purvis*, 5 T. R. 432.

who levied the distress, were opened, and the beasts taken out and driven away, it was held that this was a pound-breach, rendering the person who committed the act liable to treble damages under the statute (*l*). And if the distrainor enters and makes a general announcement of the distress on one day, and follows up the proceeding on the next, by giving the tenant notice of the particular things distrained and taken, the impounding is complete, at all events from the time of such notice (*m*).

Formerly, the distrainor, in removing the goods distrained, might have removed them to any place he thought fit for the purpose of impounding them, but the 1 & 2 Ph. & M. c. 12, s. 1, amending the statute of Malbridge (*ante*, p. 326), prohibits the distrainor from driving the distress out of the hundred, rape, wapentake, or lathe in which it has been taken, except it be to a pound overt within the same shire, not above three miles distant from the place where such distress was taken, and enacts that no cattle or goods distrained shall be impounded in several places, whereby the owner shall be constrained to sue several replevies for the delivery of the distress so taken at one time. If the distrainor uses or consumes for his own private use things distrained and impounded; if he draws beer out of a barrel (*n*), tans hides, or uses or works beasts or cattle, he of course subjects himself to an action for damages at the suit of the owner thereof (*o*). As soon as the goods are impounded they are in the custody of the law, and the tenant cannot retake them without being guilty of pound-breach, and subjecting himself to an indictment (*p*), and also to an action for treble damages and costs of suit, although the distress may be wrongful or irregular, and no rent may be in arrear or due (*q*). But where the distress is being used in a manner which the law will not justify, the owner may interfere to prevent the abuse (*r*). If the pound is broken, and the goods are unlawfully taken away, the landlord may follow them and recapture them, but he must not break open the doors of a private house, or stable, or inclosure, nor enter the grounds of a third person for the purpose of retaking the goods, except it be on fresh pursuit (*s*).

Penalties are imposed by 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, on parties neglecting to feed impounded cattle.

If the landlord refrains, at the request of the tenant, from removing the goods from the different rooms in which the landlord

(*l*) *Castleman* v. *Hicks*, Car. & M. 266.
(*m*) *Thomas* v. *Harries*, 1 Sc. N. R 534.
(*n*) *Dod* v. *Monger*, 6 Mod. 216.
(*o*) *Duncomb* v. *Reeve*, Cro. Eliz 783.
(*p*) *Rex* v. *Bradshaw*, 7 C. & P. 233.
(*q*) 2 Wm. & M. sess. 1, c. 5, s. 4; 11 Geo 2, c. 19, s. 10; Co. Litt. 47b; *Cotsworth* v. *Betison*, 1 Ld. Raym. 104.
(*r*) *Smith* v. *Wright*, 6 H. & N. 821.
(*s*) *Rich* v. *Woolley*, 5 M. & P. 675; 7 Bing. 651.

or his bailiff finds them, but takes an inventory of the goods, puts a man in possession, and hands to the tenant a notice of distress referring to the inventory, this is to all intents and purposes a distraining and impounding of the goods. Each room is, for the convenience of the tenant, and with his assent, converted into a pound for the goods therein (*t*).

Abandonment of distress.—Leaving possession of goods distrained is not necessarily an abandonment of the distress. If, therefore, a bailiff or party in possession goes away for a temporary purpose, and is then locked out, he may break open the outer door of the house to recover possession of the distress (*u*).

Statutory power of sale.—The 2 Wm. & M. c. 5, s. 1, recites that, distresses not being to be sold, but only detained as pledges for enforcing the payment of rent, the persons distraining have little benefit thereby, for remedying whereof it is enacted (s. 2), that where any goods and chattels shall be distrained for any rent reserved or due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods shall not, within five days next after such distress taken, with notice thereof and the cause of such taking left at the chief mansion-house, or other most notorious place on the premises charged with the rent, replevy the same with sufficient security, &c.; that then, after such distress and notice, and after the expiration of the said five days, the person distraining "shall and may," with the sheriff or under-sheriff of the county, or with the constable, &c., cause the goods and chattels to be appraised by two sworn (*v*) appraisers, and after such appraisement "shall and may lawfully sell (*x*) the goods so distrained for the best price (*y*) that can be gotten towards satisfaction of the rent and charges."

Tender of rent rendering a sale unlawful.—If, after the impounding, and before the sale, a tender of the rent and expenses is made, the landlord cannot lawfully proceed to sell the things distrained; for it has been held that upon the equity of the above statute, which gives the tenant five days to replevy the things distrained (s. 2), the tenant ought to have the same time for tendering the rent and expenses, and that an action is maintainable against a landlord who persists in selling after tender of the rent and costs at any time within the five days (*z*). In the case of a distress of growing crops the tenant may, at any time before the corn is ripe and fit to be cut, tender the rent due, and

(*t*) *Tennant* v. *Field*, 8 Ell. & Bl. 336; 27 Law J. Q. B. 33.

(*u*) *Bannister* v. *Hyde*, 29 Law J. Q. B. 141.

(*v*) The appraisers need not be sworn nor the sheriffs be present, see 35 & 36 Vict., c. 92, s. 13.

(*x*) See *King* v. *England*, *post*, p. 335.

(*y*) See *Hawkins* v. *Walrond*, 1 C. P. D. 280.

(*z*) *Johnson* v. *Upham*, 21 Law J. Q. B. 252, overruling, on this point, *Ladd* v. *Thomas*, 12 Ad. & E. 117, and *Ellis* v. *Taylor*, 8 M. & W. 415.

if, after that, the landlord takes the corn, he may be proceeded against as a trespasser (*a*).

Whenever goods have been seized as a distress for rent, and a tender is made of a sum sufficient to cover the rent actually due, and the costs of the distress up to the time of the tender, and the bailiff refuses to give up the goods and the tenant is obliged to pay a larger sum to get back his goods, he is entitled to an action for damages (*b*). But if the landlord distrains for a larger sum than is due, but not excessively, the tenant should tender the amount really due, if he wishes to make the detention of the goods unlawful (*c*).

Parties to whom tender may be made.—A bailiff authorised to distrain for rent has power given him at the same time to receive the rent, and the landlord has no right to circumscribe the bailiff's authority in this respect, for a tenant whose goods are seized under the extraordinary power vested in the landlord of distraining, ought to be enabled in all cases to release them at once by tender of the rent and costs to the bailiff. The power to receive the rent is therefore necessarily annexed to the warrant to distrain (*d*); but it does not follow, that because the tender may be made to the bailiff who distrains, it may be made also to any bailiff's follower who may be put into temporary possession of the goods (*e*).

Power of sale of growing crops and things fraudulently removed—Tender before sale.—The 11 Geo. 2, c. 19, which enables landlords to distrain things fraudulently removed from the demised premises, also cattle or stock of their tenants depasturing on commons, appurtenant or anyways belonging to the demised premises, and growing crops (*ante*, p. 317), enacts that it shall be lawful for the landlord in convenient time to appraise sell, or otherwise dispose of the same towards the satisfaction of the rent and charges, in the same manner as other goods and chattels may be appraised and disposed of, the appraisement to be taken when the crops are cut, gathered, cured, and made, and not before; but it is enacted (s. 8), that, if after any distress for arrears of rent so taken, and at any time before the crops shall be ripe and cut, cured or gathered, the tenant or lessee, his executors, &c., shall pay to the landlord, or to the steward or other person usually employed to receive the rent, the whole rent then in arrear, with the costs and charges of the distress, then, and upon such payment, or lawful tender thereof actually made, whereby the end of such

(*a*) *Owen* v. *Legh*, 3 B. & Ald. 473.
(*b*) *Loring* v. *Warburton*, 28 Law J. Q. B. 31; *Johnson* v. *Upham*, *supra*.
(*c*) *Glynn* v. *Thomas*, 11 Exch. 873.
(*d*) *Hatch* v. *Hale*, 15 Q. B. 15; 19 Law J. Q. B. 289.
(*e*) *Boulton* v. *Reynolds*, 29 Law J. Q. B. 11.

distress will be fully answered, the same shall cease, and the crops and produce distrained shall be delivered up to the tenant.

Notice of distress is not essential at common law to the validity of the distress (*f*). It has been expressly laid down, that if the lord distrain for rent or services, he has no occasion to give notice to the tenant for what thing he distrains, for the tenant by intendment knows what things are in arrear for his lands as rent and services, &c. (*g*): but the 2 Wm. & M. c. 5, s. 1, requires, as we have seen (*ante*, p. 330), notice of the distress to be given preparatory to a sale by the landlord, and the 11 Geo. II. c. 19, authorising the distress and sale of goods fraudulently removed (*ante*, p. 323), and of the cattle and stock of tenants depasturing on commons appurtenant or belonging to the demised premises, and growing crops (*ante*, p. 317), requires (s. 9) notice of the place where the goods and chattels distrained shall be lodged, to be given within one week to the tenant, or left at his last place of abode.

As the tenant is to have five days, under the statute of Wm. & Mary, to replevy from the time he receives notice of the distress, the notice should be given as soon as the distress has been levied. If the distress is not clearly intended to include all the goods and chattels upon the demised premises, the landlord must give the lessee distinct notice of the things included in such distress, in order that he may know what he is to replevy. And for this purpose, as soon as the distress is made, whether by the lessor or his bailiff, an inventory of the goods distrained should be made and served upon the lessee, together with the notice of the distress. The notice of the distress should set forth the amount of rent distrained for, and the particular things taken (*h*). A written notice of distress is not invalidated by a statement that the rent is due to *A*, whereas it is due to *B*, provided *B* has authorised the distress (*i*). If the landlord removes and sells goods and chattels which were not included in the inventory and notice, and which have not consequently been comprised in the distress, he is liable to an action for damages at the suit of the tenant (*k*).

Appraisement and sale.—If the tenant, after he has received casd'ce of the distress, neglects for five days, to be reckoned exclu-before the'h of the day of distress and of the day of sale, to pay the lessor or distrainor may cause the goods to be

(*f*) *Tenant* v.
27 Law J. Q. B. 3.

(*g*) *Bannister* v. *...nt*, 9 Exch. 20.
B. 141 4, DISTRESS, pl. 1;

(*h*) The appraisers n. 6 Q. B. 680.
not the bailiffs be *presndsey*, 14 Q. B.
Vict, c. 92, s. 13. 166; *Kerby* v. *Harding*, 6 Exch. 234; 20 Law J. Exch. 163.

(*i*) *Trent* v. *Hunt*, 9 Exch. 14.

(*k*) *Bishop* v. *Bryant*, 6 C. & P. 484.

appraised in the mode appointed by the statute (*ante*, p. 330), and may afterwards sell them for the best price (see *infra*) that can be got for them, and apply the purchase-money in discharge of the rent and the costs of the sale (*l*), leaving the surplus, if any, in the hands of the sheriff, under-sheriff, or constable, for the owner's use. The schedule of the 57 Geo. 3, c. 93, regulating the costs of appraisements, "whether made by one broker or more," refers only to the case of the employment of a single appraiser by consent, and does not dispense with the attendance of the two appraisers (*m*). If the broker or person actually making the distress on behalf of the landlord constitutes himself one of the appraisers, the appraisement is wrongful and irregular (*n*). If the tenant holds under a covenant not to carry hay or straw off the demised premises, the landlord who has distrained hay or straw must, nevertheless, sell it in the ordinary way for the best price. If he sells it, subject to a condition that the purchaser shall consume it on the land, he is liable to an action by the tenant for not selling it at the best price (*o*).

Costs and expenses.—By 57 Geo. 3, c. 93, it is enacted, that no persons making any distress for rent under 20*l.* shall take or receive out of the produce of the things distrained and sold any more than the following costs and charges: *i.e.* for levying the distress, 3*s.*; for the man in possession, 2*s.* 6*d.* per day (and even this charge may not under all circumstances be justifiable (*p*); for the appraisement, 6*d.* in the pound, and the amount of the stamp; for advertisements, 10*s.*; for catalogues, sale, and commission, and delivery of goods to the purchaser, 1*s.* in the pound on the net produce of the sale. If more costs and charges are levied than those allowed by the Act, the party aggrieved has a summary remedy before two justices for treble the amount of the charges, or he may bring an action for the recovery of them; but it is provided (s. 4) that no judgment shall be given against the landlord for such treble costs, unless he has personally levied the distress. Every broker or other person who shall make and levy any distress is to give a copy of his charges, and of all the costs and charges of the distress, signed by him, to the person on whose goods and chattels any distress shall have been levied, although the rent demanded may exceed the sum of 20*l.* (*q*). When the rent distrained for exceeds 20*l.*, the costs are not limited to any

(*l*) *Robinson* v. *Waddington*, 18 Law J. Q. B. 250; the marginal note of this case, in 13 Q. B. 753, is incorrect.

(*m*) *Allen* v. *Flicker*, 10 Ad. & E. 640.

(*n*) *Westwood* v. *Cowne*, 1 Stark. 172.

(*o*) *Ridgway* v. *Ld. Stafford*, 6 Exch. 404; 20 Law J. Exch. 226; *Hawkins* v. *Walrond*, *ante*, p. 330

(*p*) *Ex parte Arnison*, L. R. 3 Exch. 56.

(*q*) 1 & 2 P. & M. c. 12, s. 2; *Child* v. *Chamberlain*, 5 B. & Ad. 1049.

particular amount or fixed scale of charge, but they must be fair and reasonable (*r*).

Effect of non-compliance with the statutes authorising the sale.—The 11 Geo. 2, c. 19, s. 19, after reciting that it has sometimes happened that upon a distress made for rent justly due, the directions of the 2 Wm. & M. c. 5, for enabling the sale of goods distrained for rent, have not been strictly pursued, but through the mistake or inadvertency of the landlord or other person entitled to such rent, and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done in the disposition of the distress so seized or taken, for which the party distraining hath been deemed a trespasser *ab initio*, and in an action brought against him, the plaintiff hath recovered the full value of the rent for which the distress was taken, enacts, that where any distress shall be made for rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agents, the distress itself shall not be deemed to be unlawful, nor the parties making it be therefore deemed trespassers *ab initio;* but the party aggrieved by such unlawful act or irregularity may recover full satisfaction for the special damage he shall have sustained thereby, and no more.

The plaintiff, therefore, can only recover for an irregularity in distraining and selling where actual damage is proved. For the original taking there is to be no action; the distrainor is to be considered as being in possession of the goods, notwithstanding a subsequent irregularity. And although he holds the goods with a special authority to deal with them in a particular way, and is liable for abusing that authority, yet the Act says that the tenant shall recover full satisfaction for the damage, and no more. Where, therefore, there is no special damage there can be no satisfaction, and a verdict for nominal damages is not sustainable. Where the damages are merely nominal the defendant is entitled to a verdict (*s*). Where, therefore, the plaintiff in his declaration complained of the sale of his goods within five days, and proved that they were sold too soon, but there was no evidence to show that he had sustained any damage thereby, it was held that the judge ought to direct a verdict for the defendant (*t*). But the statute, as we have seen, does not apply to cases where the original entry upon the premises was effected in an unlawful manner, as by breaking open an outer

(*r*) *Lyon* v. *Tomkies*, 1 M. & W. 603.

(*s*) *Rodgers* v. *Parker*, 18 C. B. 112; 25 Law J. C. P. 220.

(*t*) *Lucas* v. *Tarleton*, 3 H. & N. 116; 27 Law J. Exch. 248.

door, and where, consequently, no valid distress has ever been effected (*u*).

Keeping the distress without selling.—It has generally been considered that the words in the 2 Wm. & M. c. 5, s. 2, "shall and may lawfully sell," mean that the landlord must give the statutory notice of the distress, and must proceed to appraise and sell, if the tenant does not replevy within the five days, or desire the landlord not to sell. If, however, the landlord should neglect to give notice of the distress, and to appraise and sell, but should content himself with keeping the goods in his hands, he will not be liable to an action for the detention or conversion of the chattels, unless the tenant can prove that he had gained a right to have the goods delivered up to him, and that he had sustained some special damage by the detention (*x*). The landlord has a lien for his rent upon the things distrained, and has at common law a right to keep them as a pledge until his rent is paid (*ante*, p. 306), and he can only be made responsible for not selling in an action founded upon the statute.

The landlord may, with the assent of the tenant, detain the things distrained, or convert them to his own use in satisfaction and discharge of the rent (*y*). But to obtain a title as against a third person whose goods have been distrained, there must be an actual sale. A taking of the goods by the landlord at the appraised value is not sufficient (*z*). When a landlord distrains and does not sell he cannot while he holds the distress bring an action for rent (*a*).

Indemnification of bailiffs.—We have already seen, that if a landlord employs a bailiff to make a distress on a tenant for rent alleged to be due from such tenant to the landlord, and it turns out that the landlord had no right to distrain, and the bailiff has to pay damages for the unlawful distress in an action brought against him by such tenant, the bailiff may maintain an action against the landlord for compensation (*b*).

Action for damages for wrongful distress.—If the landlord has distrained for more rent than is due, and the tenant has tendered the amount due before the distress made, his remedy, if a distress is afterwards made, would be either by replevin, or an action for a trespass, or for a wrongful seizure and conversion of the things distrained (*ante*, p. 326). If the tender is made after the distress, an action would be maintainable for the detention of

(*u*) *Attack* v. *Bramwell*, *ante*, p. 325.

(*x*) *West* v. *Nibbs*, 4 C. B. 186; *Glynn* v. *Thomas*, 11 Exch. 870; *Rodgers* v. *Parker*, *supra*; see *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.

(*y*) *Jones* v. *Sawkins*, 5 C. B. 142.

(*z*) *King* v. *England*, 33 Law J. Q. B. 145.

(*a*) *Lehain* v. *Philpott*, L. R. 10 Ex. 242.

(*b*) *Rawlings* v. *Bell*, 1 C. B. 959; *Ibbett* v. *De La Salle*, 6 H. & N. 237; 30 Law J. Exch. 44.

the property (*d*). The mere retaining by the landlord of the goods distrained after the tenant has gained a right to have them delivered up to him will not render the landlord liable to an action for a trespass. A landlord, therefore, who refuses a proper tender, is not to be regarded as a trespasser merely by reason of his non-feasance in failing to deliver up the distress on being required so to do, but his refusal may amount to evidence of a conversion (*e*).

If a landlord makes a second distress for the same rent when he might have taken sufficient at first, he is liable to an action for the wrongful conversion of the things seized under the second distress (*f*).

The wrongful seizure of beasts of the plough, or of the tools and implements of a man's trade, may be made the foundation of an action of trespass as well as of an action upon the case (*g*).

An action for an excessive distress may be brought by a lodger or under-tenant whose goods have been taken, as well as by the lessee himself (*h*). Where the plaintiff was tenant of a house, in which were goods that had been assigned to his wife's trustee, who lived with them, but the plaintiff had the actual use and enjoyment of the goods, it was held he had sufficient special property in the goods to entitle him to maintain an action for an excessive distress (*i*).

Parties to be made defendants.—Where a landlord authorised his bailiff to distrain for rent due to him from his farm tenant, and the bailiff by mistake distrained the cattle of another person beyond the boundary of the farm, and sold them, and paid over the money he received for them to the landlord, it was held that the landlord was not responsible for the trespass, unless he received the money knowing of the wrongful seizure, or unless he meant to adopt the act of the bailiff at all hazards (*k*). But if the landlord has appointed an inexperienced, insolvent, or incompetent bailiff, or has neglected to furnish him with proper instructions, he will be responsible in damages in an action for negligence. And every landlord who gives a broker a general authority to distrain is responsible if his broker exceeds his authority, by distraining things which are not distrainable (*l*), or if he sells goods without having them duly appraised (*m*); but a landlord who

(*d*) *Gulliver* v. *Cosens*, 1 C. B. 788; *Glynn* v. *Thomas*, 11 Exch. 878, *ante*, p. 331.

(*e*) *West* v. *Nibbs*, 4 C. B. 172.

(*f*) *Dawson* v. *Cropp*, 1 C. B. 961.

(*g*) *Nargett* v. *Nias*, 1 El. & El. 439; 28 L. J. Q. B. 143.

(*h*) *Fisher* v. *Algar*, 2 C. & P. 374; *Bail* v. *Mellor*, 19 Law J. Exch. 279; and see further, as to actions for the unlawful seizure and conversion, and unlawful detention of chattels, Add. on Torts, 5th ed. by Cave, pp. 458—463.

(*i*) *Fell* v. *Whittaker*, L. R. 7 Q. B. 120.

(*k*) *Lewis* v. *Read*, 13 M. & W. 837; *Freeman* v. *Rosher*, 13 Q. B. 780.

(*l*) *Gauntlett* v. *King*, 3 C. B., N. S. 59.

(*m*) *Haseler* v. *Lemoyne*, 5 C. B., N. S. 530.

does not personally interfere in making a distress is not liable for the neglect of the broker in not delivering a copy of his charges, &c., pursuant to the statute (n) (*ante*, p. 333).

All persons who aid, or counsel, or direct, or join in a trespass, are joint-trespassers, but one partner cannot drag another into a trespass without his previous consent, or without his subsequent concurrence. Where, therefore, one of several partners signed a distress-warrant in his own name on behalf of the firm, it was held that this was no proof that the distress was authorised by the firm, so as to render the other partners responsible for it. It must be shown, either by evidence before the transaction that they all joined in ordering the distress, or by evidence afterwards that they concurred in and received the benefit of it (o).

A cognizance by a defendant, as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator, and by his direction, but after his death; such distress, though made before probate, having been afterwards adopted and ratified by the executor (p).

Avowries by joint tenants, coparceners, and tenants-in-common.—If the distress is made by a bailiff or agent on behalf of all, all must join in the avowry and conusance (q). Tenants-in-common, on the other hand, must avow the taking of the distress in respect of their several shares. Thus, if three tenants-in-common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more (r). But one of several tenants-in-common may, as we have seen, distrain and avow for his own share of the rent (*ante*, p. 312).

The plea of *riens in arrere* simply alleges that no part of the rent alleged in the avowry to be in arrear was in arrear. Under this plea payments made to a ground landlord, or other incumbrancer having claims paramount to the claim of the immediate landlord making the distress, may be given in evidence in reduction of the rent, as such payments are always presumed to be authorised by the landlord, he being obliged to protect the tenant from them, and are treated as payments of rent by the tenant (s). But payments which are not a direct charge upon the demised premises cannot be given in evidence in satisfaction and discharge of the rent, unless they were directed or sanctioned by the landlord (t).

(n) *Hart* v. *Leach*, 1 M. & W. 560.
(o) *Petrie* v. *Lamont*, Car. & M. 96.
(p) *Whitehead* v. *Taylor*, 10 Ad. & E. 210.
(q) *Stedman* v. *Bates*, 1 Salk. 389.
(r) Litt. sec. 314-317; *Philpott* v. *Dobbinson*, 3 M. & P. 320.
(s) *Jones* v. *Morris*, 3 Exch. 746; as to payments under the Metropolis Management Amendment Act, 1862, 25 & 26 Vict. c. 102, s. 96, see *Ryan* v. *Thompson*, L. R. 3 C. P. 144.
(t) *Dawes* v. *Stacey*, 12 Ad. & E. 511.

The meaning of the plea of *riens in arrere* is, that the plaintiff at the time of the distress was in arrear to nobody; and if he has not paid anybody, he cannot, under this plea, contest the defendant's right to the rent (*u*).

Of the plea of not guilty "by statute" in actions of trespass, or upon the case for an unlawful distress.—By the 11 Geo. 2, c. 19, s. 21, it is enacted, that in all actions of trespass, or upon the case, against persons entitled to rents or services, their bailiffs or other persons, relating to any entry upon premises chargeable with such rents or services, or to any distress or seizure thereupon, it shall be lawful for the defendants to plead the general issue, and give the special matter in evidence, inserting in the margin of the plea the words "by statute" (*x*). Under the plea of not guilty "by statute," therefore, the defendant may give in evidence that he entered the plaintiff's house under a warrant of distress for rent, and was forcibly turned out of possession, and that he thereupon re-entered, and broke open the door of the house, in order to seize the plaintiff's goods. Everything which he might lawfully do in order to make the distress is admissible in evidence under this plea (*y*). The plea puts in issue not only the matter of justification, but the tenancy and ownership of the goods (*z*).

Plea of a recovery of the goods in an action of replevin.—A plea by the defendant, setting forth that the plaintiff commenced and prosecuted an action against the defendant in the county court of the district within which the distress was taken, and obtained the judgment of the court for the return of the goods, and has recovered his goods, and damages for the taking and detaining them, is a good plea in bar to an action for an excessive distress, as it shows that the plaintiff has already had his remedy (*a*).

So, where the defendant's broker appeared upon the plaintiff's premises, and said, "Unless you pay me 21*l.* for rent, and three guineas for expenses, I shall take your goods," and the plaintiff paid the money, it was held that it did not lie in the defendant's mouth, after receiving the money, to say there was no distress (*b*).

Proof of Excessive Distress.—It is not, as we have seen, for every trifling excess that an action is maintainable for an excessive distress. It must be disproportionate to some considerable extent (*ante*, p. 326), and must be productive of actual loss or damage to the plaintiff (*c*).

(*u*) Wightman, J., *Wheeler* v. *Branscombe*, 5 Q. B. 379.

(*x*) Reg. Gen. Hil. Term, 16 Vict. R. 21; 1 Ell. & Bl. App. lxxxiii.; Jud. Act. Or. 19, R. 16.

(*y*) *Eagleton* v. *Gutteridge*, 11 M. & W. 469.

(*z*) *Williams* v. *Jones*, 11 Ad. & E. 643.

(*a*) *Phillips* v. *Berryman*, 2 Doug. 288.

(*b*) *Hutchins* v. *Scott*, 2 M. & W. 811.

(*c*) *Rodgers* v. *Parker*, 18 C. B. 112; 25 L. J. C. P. 220; *Lucas* v. *Tarleton*, 3 H. & N. 120; 27 Law J. Exch. 246; *Piggott* v. *Birtles*, 1 M. & W. 450.

If the ground of action is that the defendant distrained for more rent than was really due, the plaintiff must prove that he tendered to the defendant the sum really due, with enough to cover the lawful charges of the distress (*d*); or that the defendant sold the things distrained, and realised by the sale of them more than was sufficient to satisfy the rent really due with the costs of the distress (*e*). A distress may, as we have seen, be excessive, although the goods when sold may realise less than the rent and expenses (*f*).

Proof of material averments in the declaration.—The statement in a declaration for an unlawful distress of the name of the person to whom the rent distrained for is due, is material, and must be proved as laid (*g*). But it is not necessary to prove the precise amount of rent alleged in the declaration to be due (*h*).

Proof of waiver of right of action.—A right of action for an unlawful or excessive distress once vested, can only be destroyed by a release under seal, or by the acceptance and receipt of something in satisfaction of the wrong done. A tenant, therefore, does not waive his right of action for an excessive distress, though he afterwards enters into a written agreement with his landlord respecting the sale of the effects seized (*i*).

Proof of tenancy as between plaintiff and defendant, if not admitted upon the record, may be established by parol evidence of the fact, notwithstanding that the tenancy has been created by a lease or agreement in writing not produced (*k*). Proof of payment and acceptance of rent will establish the fact of the relationship of landlord and tenant between the person paying and the person receiving the rent, notwithstanding the existence of a written contract of demise between them which is not produced (*l*). And "I have no doubt," observes Bayley, J., "that submitting to a distress acknowledges the tenancy. The landlord after distraining cannot bring an ejectment; and the occupier, if he does not replevy, is, I think, precluded from denying the title of the landlord" (*m*). But payment of rent under a distress is not a conclusive admission of the title of the distrainor. Counter-evidence may be given on the part of the tenant to show that the distrainor never had any title (*n*).

(*d*) *Glynn* v. *Thomas*, 11 Exch. 878; 25 Law J. Exch. 125.

(*e*) *Tancred* v. *Leyland*, 16 Q. B. 680; *French* v. *Phillips*, 1 H. & N. 567.

(*f*) *Smith* v. *Ashforth*, *ante*, p. 327.

(*g*) *Ireland* v. *Johnson*, 1 B. N. C. 166.

(*h*) *Gwinnett* v. *Phillips*, 3 T. R. 643; *Sells* v. *Hoare*, 8 Moore, 454.

(*i*) *Willoughby* v. *Backhouse*, 2 B. & C. 821; *Baylis* v. *Usher*, 4 M. & P. 790; 7 Bing. 153.

(*k*) *Rex* v. *Hull*, 7 B. & C. 611; 1 M. & Ry. 448.

(*l*) *Doe* v. *Morris*, 12 East, 237, 239n.

(*m*) *Panton* v. *Jones*, 3 Campb. 372; *Cooper* v. *Blandy*, 4 M. & Sc. 569; 1 B. N. C. 45.

(*n*) *Knight* v. *Cox*, 18 C. B. 645.

Proof of payment of rent by a tenant to an agent of the landlord who has received it on account of the landlord, and paid it over to him, is evidence against the tenant that he holds of such landlord, although the latter was unknown to him, and he supposed at the time he paid the money that the agent received it on account of another person (*o*). But proof of payment of rent to a particular individual claiming to be entitled to receive it, is only *primâ facie* evidence of a tenancy under the claimant, and the presumption of the particular tenancy may be rebutted by proof that the payment was made by mistake or under a false representation (*p*).

Proof of an attornment by the tenant to a receiver appointed by the Court of Chancery, is proof of a tenancy by estoppel as between the tenant and the receiver; but the attornment does not enure to the benefit of the person subsequently declared by the court to be the owner of the property (*q*).

Proof of the nature and terms of a tenancy will best be effected by production of the written demise, where the tenant holds under a lease or agreement in writing. If the contract is in the hands of the defendant, the plaintiff who desires to prove the amount of the rent, the time at which, or the circumstances under which, it became due, should give notice to the defendant to produce it at the trial, in order to let in secondary evidence of its contents (*r*). The old rule of law that the terms of a tenancy or the amount of the rent can be proved only by the production of the writing when the tenant holds under a written contract of demise, does not exclude evidence of admissions and acknowledgments of those terms made by a defendant holding under a lease in writing not produced. It has been held that whatever a person says, or his acts amounting to admissions, are evidence against himself, although they relate to the contents of some deed or writing, and go to prove the nature and contents of a written instrument not produced (*s*). Where, therefore, a defendant held lands under a written demise, it was held that the defendant's verbal declarations of the existence of the tenancy, and of the amount of the rent paid by him to the plaintiff, were admissible in evidence against him, without the production of the writing under which he held (*t*).

Where on the letting of lands the terms of the demise were read from a printed paper by the landlord's agent, and the tenant

(*o*) *Hitchings* v. *Thompson*, 5 Exch. 54.

(*p*) *Fenner* v. *Duplock*, 9 Moore, 40.

(*q*) *Evans* v. *Matthias*, 7 Ell. & Bl. 590; 26 Law J. Q. B. 309.

(*r*) Roscoe's Nisi Prius Evidence, p. 8.

(*s*) *Slatterie* v. *Pooley*, 6 M. & W. 668; *Boulter* v. *Peplow*, 9 C. B. 493; 19 Law J. C. P. 193; *Earle* v. *Picken*, 5 C. & P. 542.

(*t*) *Howard* v. *Smith*, 3 M. & Gr. 254; 3 Sc. N. R. 574.

entered and occupied, and paid rent, it was held that the agent might give oral evidence of the terms, using the printed memorandum to refresh his memory (*u*).

Damages recoverable—Double value.—By 2 Wm. & M. sess. 1, c. 5, s. 5, it is enacted that if any distress and sale be made by virtue and under colour of that Act for rent pretended to be arrear and due, where no rent is arrear or due to the person distraining, the owner of the goods distrained and sold may by action of trespass, or upon the case, against the person distraining, recover double the value of the chattels so distrained and sold, together with full costs of suit. When an action is brought upon this statute for the seizure and sale of goods for rent pretended to be in arrear and due, when in truth no rent is in arrear or due to the person distraining, and the plaintiff claims double the value of the goods distrained, the jury should be directed, if they find for the plaintiff, to ascertain in the first place the actual value of the goods, and then to give damages to the plaintiff to the amount of double the value. If the jury assess the damages generally at a certain sum and it turns out that they have assessed only the actual value of the single damage, the mistake cannot be rectified, and judgment cannot be entered up for the double or treble value. But if they expressly find and assess only the actual value, the plaintiff may apply to the court to have judgment entered up for double value, according to the statute (*x*).

Whenever the landlord has distrained, without any right or authority to distrain, there is a trespass upon, and injury to, the realty, independently of the trespass in regard of the seizure of the chattels, and the tenant is entitled to recover substantial damages for the disturbance of the peaceful possession of his house, as well as for the unlawful seizure of the goods.

The damages recoverable where the entry upon the premises was effected in an unlawful manner, and the parties had no right to touch the goods after they had entered, by reason of the trespass in entering, are the same as would be recoverable from a stranger who had broken and entered the house without any colour of authority, and it does not lie in the defendant's mouth to say, in mitigation of damages, that he had sold the goods, and applied the proceeds of the sale in satisfaction and discharge of the rent (*y*). Where a distress is wrongful, the party distrained upon has a right to be replaced in the situation in which he was before the seizure, for "parties are not to extort even what is justly due by the

(*u*) *Bolton (Lord)* v. *Tomlin*, 5 Ad. & E. 863.

(*x*) *Masters* v. *Farris*, 1 C. B. 716; Add. on Torts, by Cave, 5th ed., p. 75, DOUBLE AND TREBLE DAMAGES.

(*y*) *Attack* v. *Bramwell*, 32 Law J. Q. B. 146.

improper execution of a warrant." If goods, therefore, wrongfully distrained have been sold, or money has been paid to procure the liberation of goods distrained, the value of the goods in the one case and the money paid in the other will be recoverable, as well as any special damage that may have been sustained, and the landlord cannot appropriate the money he has received by trespass and wrong in payment of the rent due to him (z).

Recovery of special damage.—We have already seen that by the express terms of the 11 Geo. 2, c. 19, s. 19, the party injured by an unlawful act committed *after* a lawful distress, is only to recover the amount of damage he has actually sustained. This damage, in the case of a wrongful seizure and sale of growing crops, is the difference between the amount for which the crops would have been sold if the sale had been regular, and what they actually sold for; and where there is no difference, or it is proved that the crops were sold for more than they were worth, no damages are recoverable, and the defendant is entitled to a verdict (a).

In an action for selling goods distrained for rent without an appraisement, and without complying with the provisions of 2 Wm. & M., sess. 1, c. 5 (*ante*, p. 330), the measure of damages is the real value of the goods sold minus the rent. The wrong-doers cannot get off by handing over to the plaintiff the mere proceeds of the sale (b).

In an action for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure, the plaintiff is not entitled to recover the full value of the crops beyond the amount for which the distress ought to have been levied. "The true measure of damage is simply a compensation for the additional expense of a distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession; and some compensation for the loss of the absolute ownership and power of disposition for the same time; or, if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a greater amount." (c).

Where the plaintiff in his declaration for a wrongful distress claimed damages for the loss of divers lodgers, without naming any, Lord Ellenborough refused to allow him to prove that he had

(z) *Attack* v. *Bramwell*, 3 B. & S. 520; 32 Law J. Q. B. 146; *Sowell* v. *Champion*, 6 Ad. & E. 407.

(a) *Rodgers* v. *Parker*, 18 C. B. 112; *Lucas* v. *Tarleton*, 3 H. & N. 116; *Proudlove* v. *Tremlow*, 1 Cr. & M. 326.

(b) *Knight* v. *Egerton*, 7 Exch. 407; *Biggins* v. *Goode*, 2 Cr. & J. 367; *Whitworth* v. *Maden*, 2 C. & K. 517.

(c) *Piggott* v. *Birtles*, 1 M. & W. 451

in fact lost a lodger, because the name of the lodger had not been specified in the declaration (*d*).

If the landlord takes some things that are distrainable, and other things which are not, this does not render the distress wrongful *ab initio;* but the wrong is limited to the seizure of the goods which were not distrainable, and the tenant is entitled to recover only the actual damage sustained by him from the seizure of those particular chattels (*e*). In respect of the things not distrainable, the distrainor is a trespasser *ab initio*, and the full value of them is recoverable (*f*).

Nominal damages are recoverable in an action for an excessive distress where no actual damage is proved (*g*).

SECTION III.

THE LETTING OF CHATTELS.

Of bailments for hire.—The term bailment, derived from the French word *bail* or *bailler*, to deliver, denotes, in the common law, a delivery or transfer of a chattel from one person to another, in order that something may be done with it, either for the benefit of the owner, or of the party who receives it as the temporary possessor, or for the mutual benefit of both of them, and is applied to contracts for the letting and hiring of chattels, as well as to contracts for the delivery of them to persons for safe custody or to workmen to be worked upon or dealt with in the course of their employment. The term is also equally applicable to contracts for the letting and hiring of realty, although it is not used in the common law to denote that class of contracts. In the French law, the term BAIL *a loyer*, or bail for hire, anciently denoted a contract for the letting and hiring of a house, or farm, or immovable property; but in modern times it has been applied by the French jurists to contracts for the letting and hiring of personalty as well as of realty. In this class of contracts, the person who delivers the chattel for the purposes of the contract is called the *bailleur* or bailor, and the party who receives it the bailee.

If one man bails or delivers a chattel to another to be used for

(*d*) *Westwood* v. *Cowne*, 1 Stark. 172.

(*e*) *Harvey* v. *Pocock*, 11 M. & W. 740.

(*f*) *Keen* v. *Priest*, 4 H. & N. 236; 28 Law J. Exch. 157; *Attack* v. *Bramwell*, *ante*, p. 342; *Edmondson* v. *Nuttall*, 34 Law J. C. P. 102.

(*g*) *Chandler* v. *Doulton*, 3 H. & C. 553; 34 Law J. Exch. 89.

hire upon the express or implied understanding that the chattel is to be put into a serviceable state and made ready for immediate use by the hirer, there is no implied warranty or undertaking on the part of the bailor that the chattel is in any particular state or condition, or fit for any particular purpose. But, if he expressly or impliedly represents it to be fit for immediate use, or to be applicable to any particular purpose, he impliedly warrants the use for which he receives the hire. If a man, for example, lets out the naked hull or the mere fabric of a vessel, upon the terms that the hirer is to man and equip her, and get her ready for sea, there is no implied warranty or undertaking on the part of the shipowner that the vessel is in any particular state and condition at the time of the making of the contract. But, if he mans and provisions and equips the vessel himself, and holds her out as fit for immediate use, there is an implied promise or undertaking on his part that she is seaworthy and fit for use, and properly found and provided with stores and provisions, seamen and officers, and all things needful to the due prosecution of the voyage (*a*). So, if a man lets out the mere fabric of a coach or carriage upon the understanding that the hirer is to provide the horses, harness, servants, and equipments, and prepare the vehicle for use, there is no implied warranty or undertaking on his part that the chattel is in any particular state or condition at the time that he parts with the possession of it; but, if he gets it ready for the road, he impliedly warrants the vehicle to be road-worthy and fit for the performance of the journey for which it is known to be required; and this implied warranty extends to the coachman, horses, and harness, and all the other necessary equipments for the journey. And, if a man lets out furniture for immediate use, there is an implied warranty on his part that it is fit for use, and free from all defects inconsistent with the reasonable and beneficial enjoyment of it (*b*). "If he lets out vessels for holding oil or wine, and furnishes to the hirer vessels that are not in good condition, he shall be responsible for the damage that may accrue; for he who lets out a thing for use ought to know whether it is fit for use, and to warrant the use for which he takes the hire" (*c*). If he lets out a horse bridled and saddled, and prepared for immediate use by an equestrian, he impliedly warrants the equipments to be road-worthy and fit for use, and the horse itself to be well shod (*d*), and free from such vices and defects as render it dangerous and unfit to ride.

(*a*) *Lyon* v. *Mells*, 5 East, 437; *Burgess* v. *Wickham*, 33 L. J. Q. B. 17; *Stanton* v. *Richardson*, L. R. 7 C. P. 521; 9 C. P. 390; 41 L. J. C. P. 180; 43 L. J. C. P. 230; *Steel* v. *The State Steamship Co*, 3 Ap. Cas. 72.

(*b*) *Sutton* v. *Temple*, 12 M. & W. 60.

(*c*) Domat, l. 1, tit. 4, s. 3, 8; Dig. lib. 10, tit. 2, 19, s. 1.

(*d*) Pothier (LOUAGE), No. 54; *Blackmore* v. *Brist. & Exeter Ry. Co.*, 8 Ell. & Bl. 1051; 27 L. J. Q. B. 167.

Of the duties and responsibilities of the hirers of chattels.—If a coach-proprietor lets his coach and horses for a journey, and the coach is driven by the coachman, and is under the direction and management of the servants, of the owner, the latter is bound to keep the horses properly shod, and the carriage in good travelling order; but, if the possession thereof is transferred to the hirer, and the carriage is driven and managed by the hirer's servants, this duty then falls upon the hirer, although the owner or lettor of the chattel may, under certain circumstances, be obliged, as we shall presently see, to repay to the hirer the money expended by him in repairs (*e*). Whenever a chattel bailed or delivered to a hirer to be used for hire has sustained a partial injury through an inherent defect in the article itself, or by reason of some inevitable accident which threatens its total and immediate destruction, and the effects of such partial injury may be obviated and the chattel preserved for future use by repairs and remedies promptly provided, there is an implied authority from the owner to the hirer to undertake the necessary repairs and apply the remedies, and incur all such expenses as a prudent man would, under the circumstances, incur for the preservation of his own property. In order to establish a claim for the payment of expenses of this description in the Scottish law, it is necessary, observes Mr. Bell, to show in the first place that the occasion of the expense was not ascribable to the hirer; secondly, that the expense was indispensably necessary; and, thirdly, that the owner had notice of it as soon as circumstances permitted (*f*)

Of the use of chattels let to hire—Losses from negligence.—Every hirer of a chattel is bound to use the thing let in a proper and reasonable manner, to take the same care of it that a prudent and cautious man ordinarily takes of his own property, and to return it to the bailor or owner at the time appointed for its return (or within a reasonable period after request, if no such time has been agreed upon), in as good condition as it was in at the time of the bailment, subject only to the deterioration produced by ordinary wear and tear and reasonable use, and by injuries caused by accidents which have happened without any fault or neglect on the part of the hirer. Where the hirer contracted to deliver up a barge at the conclusion of the hiring "in good working order with all her rigging, gear and implements complete," it was held that this must be construed with reference to the condition of the barge (which was an old one) at the commencement of the hiring (*h*).

Losses from piracy, robbery, theft, disease, and accident.—If the

(*e*) Pothier (LOUAGE), No 117, 120.
(*f*) 1 Bell's Com. 453.
(*h*) *Shroder* v. *Ward*, 13 C. B. N. S. [illegible]

thing let to hire perishes, or is destroyed by fire, or is stolen without any neglect or want of care on the part of the hirer, the latter will not be responsible for the loss (*i*); but in cases of stealing, a robbery by force must be proved, or, if there has been a secret theft, it must be shown by the hirer that he had taken all such precautions as are ordinarily taken by prudent men to protect their own property from depredation. If a ship hired for a particular voyage, and placed in the possession and under the control of the hirer, be captured by pirates, or be lost in a storm in the ordinary course of the voyage, the owner must bear the loss; but, if the hirer has deviated from the ordinary course, and sailed unnecessarily through dangerous channels, or into seas infested with pirates, and needlessly encountered risks not contemplated by the owner at the time of the hiring, and which would probably not have been run by him except for a greatly increased rate of remuneration, the hirer is liable for the loss.

An owner of a chattel which is out on hire for an unexpired term may maintain an action against a third person for a permanent injury thereto (*k*).

Determination of the bailment.—If chattels have been bailed or let to hire for a certain term, and the bailee does an act which is equivalent to the destruction of the chattels, or which is entirely inconsistent with the terms of the bailment; if he sells, or attempts to sell, the chattels, or to dispose of them in such a way as to put it out of his power to return them, the act operates like a disclaimer of tenancy (ante, p. 257), the bailment is at an end, and the possessory title reverts to the bailor, and entitles him to maintain an action for the value of the chattels (*l*).

Loans of money to be used for hire.—The lending of money for hire is ordinarily denominated a loan at interest, as distinguished from a *commodatum* or gratuitous loan, where the sum advanced only is paid back without any interest or fruits of increase. A loan of money to be used for hire is a loan for use and consumption, the identical thing lent not being intended to be returned, but its equivalent in value and kind. The absolute property, therefore, in the subject-matter of the loan passes together with the transfer of the possession to the hirer or borrower; and the latter becomes indebted to the lender in an equivalent in value and amount, with interest, which must be paid and rendered to the latter at the time agreed upon, or within a reasonable period after demand made, in case no time

(*i*) *Williams* v. *Lloyd*, W. Jones, 179; *Taylor* v. *Caldwell*, 3 B. & S. 836; 32 L. J. Q. B. 164.

(*k*) *Mears* v. *London & South West. Ry. Co.*, 11 C. B. N. S. 850; 31 L. J. C. P. 220; and see *Lancashire Waggon Co.* v. *Fitzhugh*, 6 H. & N. 502; 30 L. J. Ex. 231.

(*l*) *Fenn* v. *Bittlestone*, 7 Exch. 159; 21 L. J. Ex. 41.

for its return has been limited. The liability of the hirer or borrower, consequently, to repay the equivalent amount is not discharged by the loss of the money from robbery, fire, or inevitable accident.

Of commodatum and mutuum or gratuitous loan.—If the bailee is to have the use and enjoyment of the subject-matter of the bailment for his own benefit and advantage, without payment of hire or reward to the bailor, then the bailment becomes a gratuitous loan. There are in the civil law, two kinds of gratuitous loans, the one called a MUTUUM, which is a loan for use and consumption, the thing being bailed to be consumed and an equivalent in kind subsequently returned; and the other a COMMODATUM, which is a loan of a specific chattel to be used by the bailee and returned *in individuo.* In the loan by way of *mutuum* the bailor is called the creditor, by reason of the credit given by him to the promise of the bailee, and the latter the debtor, because he owes an equivalent to be paid back (*m*). In the loan by way of *commodatum,* the parties are known in law by the ordinary appellation of borrower and lender. "The Latin language," observes Gibbon, "very happily expresses the fundamental differences between the COMMODATUM and the MUTUUM which our poverty is reduced to confound under the vague and common appellation of a loan. In the former, the borrower was obliged to restore the same individual thing with which he had been accommodated for the temporary supply of his wants; in the latter, it was destined for his use and consumption, and he discharged this *mutual* engagement by substituting the same specific value according to a just estimation of number, of weight, and of measure" (*n*).

If corn or potatoes, wine or brandy, coals or oil, be borrowed, they are borrowed to be consumed, the corn being eaten, the wine drunk, and the coals and oil burned and consumed. A loan of this description, therefore, is necessarily a *mutuum*; for the identical thing lent cannot be returned, but an equivalent in kind must be rendered back. If money is lent to be used, the money is necessarily mixed with other coin of a similar denomination; it passes into other hands; its identity and individuality are destroyed; and the specific pieces of coin cannot be rendered back. A loan of money, therefore, is a *mutuum,* the borrower being bound to restore not the identical money lent, but an equivalent in the shape of money of the same denomination and value (*o*). But, if a horse or a book be lent for use, the identity and individuality of the chattel are not destroyed or in any way affected by the use; the same

(*m*) Dig. lib. 50, tit. 16, lex 11; lib. 12, tit. 1, lex 2, ss. 1, 3.

(*n*) Gibbon's Roman Empire, ch. 44, 3, 2

(*o*) *Et, quoniam nobis non eadem res sed aliæ ejusdem naturæ et qualitatis red-*

horse and the same book remain, though the one may have been ridden and the other read; the loan, therefore, is a COMMODATUM; and the borrower does not fulfil his engagement by rendering an equivalent in the shape of a different horse or a different book of equal value, but is bound to return the identical thing lent (*p*). It is of the very essence of a *commodatum* that the subject-matter of the bailment be granted to be used free of reward; for, if anything be paid for the use of the chattel, the contract is a contract of letting and hiring, and belongs to the class LOCATIO REI (*q*).

Liabilities of the borrower—Of the care to be taken of things borrowed—Negligence and misconduct of the borrower.—In a bailment by way of *mutuum*, the chattel bailed becomes the absolute property of the bailee to do what he pleases with it, and use it in any way he thinks fit (*r*); but in a bailment by way of *commodatum*, the temporary right of possession and user only are transferred, the right of property remaining in the lender (*s*); and the borrower, consequently, is obliged to render back the identical thing lent in as good a condition as it was in when borrowed, subject only to the deterioration resulting from inherent defects or produced by ordinary wear and tear and the reasonable use of it for the purpose for which it was known to be required (*t*). "If I lend a piece of plate, and covenant by deed that the party to whom it is lent shall have the use of it, and the plate be worn out by ordinary use and without any fault, I shall have no remedy for the loss (*u*). But the borrower is bound," observes Holt, C.J., "to the strictest care and diligence to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so that, if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse to go westward, and the bailee go northward, if any accident happen to the horse on the northern journey, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than as he was lent, that accident would not have happened to him" (*x*). If a horse is lent for the performance of an ordinary journey, and the borrower leaves the high road and travels unnecessarily through by-paths or dangerous roads, and the horse falls, and is injured, he will be responsible to the lender; but, if

duntur, inde etiam mutuum appellatum est quia ita a me tibi datur, ut ex meo tuum fiat; Inst. lib. 3, tit. 15: Dig. lib. 13, tit. 6, l. 3, s. 6.

(*p*) Doct. and Stud. Dial. 2, ch. 38.

(*q*) Inst. lib. 3, tit. 15, s. 2; Dig. lib. 13, tit. 6.

(*r*) *Appellata est autem mutui datio ab eo, quod de meo tuum fit: et ideo, si non fiat tuum, non nascitur obligatio;* Dig. lib. 12, tit. 1, s. 2. Instit. lib. 3, tit. 15.

(*s*) *Nemo enim commodando rem facit ejus cui commodat;* Dig. lib. 9.

(*t*) *Handford* v. *Palmer*, 5 Moore, 76.

(*u*) Hale, C. B., *Pomfret* v. *Ricroft*, 1 Saund. 323, *b*.

(*x*) *Coggs* v. *Bernard*, 2 Raym. 915; Bract. lib. 3, ch. 2, s. 1, pp. 99, 100.

the horse is lent for the purpose of hunting, then the borrower is justified in using it in by-paths and dangerous places, and may expose it to all the ordinary risks of the chase, because those risks are necessarily incident to the use for which the horse was borrowed, and were known to and must have been contemplated by the lender.

The owner must stand to all the ordinary risks to which the chattel is naturally liable, but not to risks occasioned by negligence or want of ordinary caution on the part of the hirer. If a carriage, for example, let to hire, breaks down on the ordinary public thoroughfare, through the badness of the road, or is injured by a flood or inundation, the owner must bear the loss, although the carriage was driven by the servants and horses of the hirer But if the hirer had gone out of his way to meet the danger—if he had travelled by unusual and difficult roads, or crossed a plain subject to floods, when he might have kept the high ground, and been safe, he must make good the loss that has been occasioned thereby. If the owner sends his own postillion or coachman to drive the carriage, the hirer is discharged from all attention to the horses and the risks of the road, and is bound only to take ordinary care of the glasses and inside of the carriage whilst he sits in it, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands (*y*). If a horse is hired as a saddle-horse, the hirer has no right to use it in a cart, or as a beast of burden. If it is hired to go to Richmond, he has no right to go with it to York; and if, during such misuser, a loss occurs, the hirer will be responsible therefor.

If a horse hired for a journey is taken ill on the road, and the hirer calls in a farrier, he will not be responsible if the horse dies, although the death may have been occasioned by the injudicious treatment of the latter; but if the hirer neglects to avail himself of proper advice and assistance, or chooses ignorantly to prescribe himself, and from unskilfulness gives the horse improper medicine, and the horse dies, he is liable to the owner for the loss (*z*). It is of course the primary duty of the hirer, in the absence of an express stipulation to the contrary, to supply an animal hired by him with suitable food during the time it is intrusted to him for use; and if a hired horse is exhausted, or becomes ill, and refuses its food, and the hirer notwithstanding pursues his journey, and by so doing injures or kills the horse, he will be responsible therefor to the owner (*a*).

(*y*) Jones on Bailments, 88; Pothier (LOUAGE), No. 106, 190; Tr. des Oblig. 1, 543.

(*z*) *Deane* v. *Keate*, 3 Campb. 4.

(*a*) *Handford* v. *Palmer*, 5 Moore, 79; 2 B. & B. 359; *Bray* v. *Mayne*, 1 Gow, N. P. C. 1.

The gratuitously permitting a person to use a shed, by himself or his servant, for a particular purpose, is a mere revocable licence, and has no analogy to a bailment of personal property; and the only duty imposed on such person is that there shall not be negligence in the use of the shed; and he is not liable for the negligence of his servant not within the scope of his employment (*b*).

Losses from ordinary casualties.—The measure of care and diligence to be exercised for the protection and preservation of a thing bailed by way of *commodatum*, whilst it remains in the possession of the borrower, is that amount of care, prudence, and foresight which the most vigilant and careful of men exercise for the preservation and protection of their own property. The foundation for this increased liability on the part of the borrower, in comparison with the hirer of a chattel, arises from the fact that the lender himself derives no benefit from the contract, but in making the bailment performs a gratuitous act of kindness dictated by his confidence in the bailee. The borrower cannot be made responsible for inevitable accidents, or casualties which could not have been foreseen, and which no human prudence could have guarded against; but he will be answerable for the "least neglect." If the borrower of a horse puts the horse in his stable, and the horse is stolen from thence, the borrower will not be answerable for him. But, if the borrower or his servant leave the stable-doors open at night, and thieves take the opportunity of that and steal the horse, he will be chargeable for the loss; for the neglect to lock the door may have encouraged the thieves, and been the occasion of the robbery (*c*).

Misuser by the borrower—Want of skill.—If the borrower takes the horse off the high road against the will of the lender, and rides him into wet and slippery ground, and the horse slips and is injured, the borrower must make good the loss. It has been said that every lender of a horse for riding impliedly bargains, at the time he makes the loan, for the exercise on the part of the borrower of competent skill in riding and the management of a horse (*d*); but, if the bailor chooses, without making any previous inquiry, to entrust a fiery and high-spirited horse to a stranger, of whose skill in horsemanship he knows nothing, he has no right to expect the management and dexterity of an experienced rider. Neither, if he lends valuable property to a notorious drunkard or notoriously wild and reckless character, has he any right to expect the care

(*b*) *Williams* v. *Jones*, 33 L. J. Ex. 297.

(*c*) *Coggs* v. *Bernard*, 2 Raym. 916; Dig. lib. 44, tit. 7, l., s. 4; Bract. lib. 3, ch. 2, p. 99; Instit. lib. 2, tit. 15, s. 2; Doctor and Student, Dial. 2, ch. 38.

(*d*) Jones's Bailments, 65; *Wilson* v. *Brett*, 11 M. & W. 115.

and attention of a very vigilant and painstaking person (*e*). By the civil law, the borrower is responsible for all losses and injuries to the thing borrowed occasioned by the private enmity of persons hostile to him, if he has by some fault or misconduct on his part provoked that enmity (*f*). The loan of the use, moreover, is strictly personal to the borrower, founded on the confidence reposed in him, and does not, in general, warrant a user by his servants (*g*).

Restoration of the thing borrowed or its equivalent—Loss by robbery, fire, or inevitable accident.—In the case of a loan by way of MUTUUM, the borrower is bound to restore, at the time agreed upon or within a reasonable period after request, an article of the same kind and quality as the one originally lent to him. If, by the agreement of the parties, an article of a different character is to be returned, the contract is not a *mutuum*, but an exchange or sale (*h*). All such things, say the civilians, as are ordinarily regulated by number, weight, or measure, such as wine, corn, oil, money, brass, silver, or gold, may properly be made the subject of a *mutuum*, as they can readily be repaid in kind of the same quantity and quality; but a horse, a greyhound, a fowling-piece, and all chattels whose value depends upon the intrinsic qualities of each in particular, and not upon the general attributes of the genus, cannot properly be made the subject of a *mutuum*, because, although they are of the same kind, yet each one of the kind differs so much from another in quality and attributes, that the creditor cannot be compelled against his will to take one for another.

As the right of property in the thing bailed is transferred to the bailee by a bailment by way of *mutuum*, so also is the risk of loss. If, therefore, the bailee is robbed before he reaches home, or the thing bailed is destroyed by wreck, fire, or inevitable accident before it can be used, the bailee must, nevertheless, pay the equivalent which he owes to the bailor at the time appointed (*i*). "If money, corn, wine, or any other such thing which cannot be re-delivered be borrowed, and it perish, it is at the peril of the borrower. But, if a horse, or a cart, or such other things as may be used and delivered again, be used according to the purpose for which they were lent, if they perish, he who owns them shall bear the loss, if they perish not through the default of him who borrowed them, or of him who made a promise at the time of the

(*e*) Pothier, *Prct à Usage*, ch. 2, s. 2, art. 2, No. 49; Bract. lib. 3, tit. 2, s. 1, 99 b.

(*f*) Dig. lib. 19, tit. 2, lex 27, s. 4.

(*g*) *Bringloe* v. *Morrice*, 1 Mod. 210.

(*h*) Dig. lib. 12, tit. 1, 2, 3; *South Australian Insurance Co.* v. *Randell*, L. R. 3 P. C. 101.

(*i*) Instit. lib. 3, tit. 15, s. 2; Doct. & Stud. Dial. 2, ch. 38; Bract. 99, a, b.

delivery to re-deliver them safe again. If they be used in any other manner than according to the lending, in whatever manner they may perish, if it be not by default of the owner, he who borrowed them shall be charged with them in law and conscience" (*k*). When the loan is made by way of COMMODATUM, the borrower must return the specific thing lent within a reasonable period after request, and if he neglects so to do, he is responsible for all accidents that afterwards happen to it. He has no right to detain the thing borrowed for any antecedent debt due to him. "The plain reason is that it would be a departure from the tacit obligations of the contract. No intention to give a lien for a debt can be implied from the grant of a mere favour." Neither can the borrower set up a right to detain the chattel for the payment of necessary expenses incurred by him in the keeping and preserving it (*l*).

Adverse claimants.—Eviction by title paramount, post, p. 361.

Implied obligations and duties of the lender.—There is an implied undertaking on the part of the lender to the borrower of a chattel not to conceal from the borrower secret defects in the chattel known to the lender, which may make the use of the chattel perilous to the borrower. Thus, if one man lends a gun to another, and the lender knows at the time he lends the gun that it is unsafe and dangerous to use, and neglects to disclose the fact to the borrower, he will be responsible in damage to the latter if the gun bursts and injures him (*m*). But a gratuitous lender of an article is not liable for injury resulting to the borrower or his servant, while using it, from a defect not known to the lender (*n*).

Loans of money to one of several partners—Where one of several partners, who was travelling for orders, called upon the plaintiff in the country, and, after transacting business with him, on account of the firm, borrowed a sum of money to defray his expenses back to London, Lord Kenyon held that, as the money was lent to the partner while employed on the partnership business, the partnership was responsible for the payment of the debt (*o*). But, if the partner professes to borrow money for the firm, and misapplies it, and there be proof that the plaintiff lent it under circumstances of negligence, and out of the ordinary course of business, he cannot recover the amount from the other partners (*p*). And, if the creditor lending the money advances it at

(*k*) Noy's Maxims, ch 43.
(*l*) *Turner* v. *Ford*, 16 M. & W. 212.
(*m*) *Blakemore* v. *Brist. & Ex Ry Co.*, 8 Ell. & Bl. 1051; 27 L. J. Q B. 167
(*n*) *MacCarthy* v. *Young*, 6 H. & N. 329, 37 L. J. Ex. 227.
(*o*) *Rothwell* v. *Humphreys*, 1 Esp. 405
(*p*) *Loyd* v. *Freshfield*, 9 D. & R. 19.

the request of one of the partners, for the known private purposes and private accommodation of the latter, and not for the trading purposes of the co-partnership, such creditor cannot make the firm responsible for the repayment of the money (q). If money is lent on the individual security and credit of one partner alone, the firm at large cannot be charged with the re-payment of it, although it may in fact be subsequently applied to the use of the partnership. Thus, where one partner was in the habit of drawing bills in his own name, and getting them discounted by the plaintiff, and using the proceeds of such bills in the business of the firm, and applying them to the general purposes of the partnership, it was held that the plaintiff could not treat the money advanced by way of discount on the bills accepted by the partner in his own name only as a loan to the firm (r). But, where a member of a partnership was in the habit of drawing bills in his own name upon the firm, and getting them discounted, and applying the proceeds to the general purposes of the partnership, and the firm regularly accepted and paid the bills so drawn until it became bankrupt, it was held that the members of the firm must be taken to have given their co-partner authority to raise money for the use of the firm upon the bills in question, and that the money advanced by way of discount upon them might be treated as a loan to the partnership (s). There is no implication of law from the mere existence of a trade partnership, that one partner has authority to bind the firm by opening a banking account on its behalf in his own name (t).

Loans to registered companies.—There is nothing illegal in a registered company commencing business, and proceeding to raise money in the exercise of their borrowing powers, before the whole of the nominal capital has been subscribed (u). If the directors of a registered joint-stock company are empowered to borrow money, the power to be exercised in accordance with certain prescribed formalities, and the directors borrow money without complying with the formalities, this is a matter between them and the shareholders, and does not deprive the lender of his rights against the company (x), for he has a right to presume that the formalities have been gone through, but if they have no such powers, the lender should have informed himself of the fact, and he cannot

(q) *Bishop* v. *Countess of Jersey*, 23 L. J. Ch. 483.

(r) *Emly* v. *Lye*, 15 East, 11, *Smith* v *Craven*, 1 Cr & J 500, *Bevan* v. *Lewis*, 1 Sim. 376

(s) *Denton* v *Rodie*, 3 Campb. 493, *Ex parte Bolitho*, Buck, 100

(t) *Alliance Bank* v. *Kearsley*, L. R. 6 C P. 433; 40 L. J C P 249.

(u) *M'Dougall* v *Jersey Imp. Hotel Co (Limited)*, 34 L J. Ch. 28.

(x) *Agar* v. *Athenæum Assur. Co.*, 3 C B. N S. 753, *Royal British Bank* v. *Turquand*, 6 Ell & Bl 332; *Fountaine* v. *Carmarthen Ry*, L R 5 Eq. 316.

recover from the company (y). Although the managers of the company are raising money for purposes unauthorised by the deed of settlement or articles of association, yet, if the shareholders, with full knowledge of these transactions, take no steps to ascertain whether the capital has been properly increased or not, but reap the benefit derived from the increase, they cannot be afterwards heard to say that the money was not advanced for the general use and purposes of the partnership (z). And, whenever money has been borrowed by directors and has been expended in furtherance of the general purposes of the company, and the shareholders have had the benefit of the loan, they will not, in general, be allowed to repudiate the transaction on the ground that the directors had no power to borrow. They cannot keep the money, and repudiate the agency by which it was obtained (a). Debentures issued by a company under a general power of borrowing, in part discharge of existing debts, are valid (b).

Damages in actions for not re-placing stock.—In an action for not re-placing stock lent on a given day, the measure of damages is the value of the stock in the market on the day on which it ought to have been re-placed, or at the time of trial, at the option of the plaintiff (c). Where, however, a stock mortgage was made for a term of years, for securing the re-transfer of stock at the end of the term, and payment in the meantime of interest calculated on the proceeds of the stock sold to raise the loan, and, the mortgage having been allowed to run after the end of the term, the stock fell in price, it was held that the mortgagee was not entitled to the market value of the stock at the end of the term, but that the mortgagor could redeem on re-placing the specific amount of stock originally sold (d). If dividends are to be paid in the intermediate time, interest may be given upon the value of the capital stock (e).

(y) *Irvine* v. *Union Bank of Australia*, 2 Ap. Cas. 366.

(z) *Re Magdalena St. Nav. Co.*, 29 L. J. Ch. 667.

(a) *Elect. Tel. Co., in re*, 30 Beav. 225; *Troup, in re*, 29 Beav. 353.

(b) *Inns of Court Hotel Co., in re*, L. R. 6 Eq. 82. And as to borrowing money on debentures see *post*, p. 823.

(c) *Shepherd* v. *Johnson*, 2 East, 211; *M'Arthur* v. *Ld. Seaforth*, 2 Taunt. 257; *Downes* v. *Back*, 1 Stark. 318; *Owen* v. *Routh*, 14 C. B. 327.

(d) *Blyth* v. *Carpenter*, L. R. 2 Eq. 501; 35 L. J. Ch. 823.

(e) *Dwyer* v. *Gurry*, 7 Taunt. 14.

CHAPTER II.

CONTRACTS FOR SERVICES.

SECTION I.

WORK AND LABOUR.

Deposit or simple bailment, styled by the Roman lawyers *depositum*, may be defined to be a delivery or bailment of goods in trust to be kept for the bailor and re-delivered on demand (*a*). It is of the very essence of a deposit that it be gratuitous; for, if anything is to be paid for the care and custody of the article, it immediately becomes a contract for the letting and hiring of labour and services and care to be employed upon the chattel, and belongs to the class LOCATIO OPERIS ET CUSTODIÆ. Where shares were deposited with bankers by a customer under such circumstances as would have entitled the bankers to a lien upon them for their general banking account, it was held that they were bailees for reward (*b*).

In the Roman law the term *depositum* is applied to the delivery of realty to be kept for the owner as well as to a delivery of personalty. Thus, when a man during his absence from home committed his house, and all that was in it, to the keeping of a friend, this was called a deposit by the civilians. In the absence of an express contract between the parties, the nature of the bailment must be determined by the nature of the thing bailed, and upon what is required to be done for its preservation and safe keeping. When passive custody in some secure place of deposit alone is required, as in the case of most bailments of inanimate chattels, the bailment is a naked deposit or simple bailment, whilst, if work and labour, services and skill, are necessarily required for its preservation, as in the case of bailments of living animals or

perishable chattels, then the bailment becomes, as presently mentioned, a mandate.

What is necessary to constitute a deposit—Executory and executed promises.—To constitute a deposit, the subject-matter of the bailment must be either actually or constructively delivered to the bailee, or it must be in his possession or under his control at the time he undertakes the charge of it. A mere promise to take charge of a thing which has never either actually or constructively come into the possession of the promisor cannot constitute a deposit. But a delivery to the servant of the promisor, or to a person whom he has appointed to receive the chattel, and who has consented to hold it on his behalf, or any acts on the part of the promisor manifesting a clear intention to take charge of a thing which is not capable of manual delivery, but which has been placed at his disposal and under his control, will constitute a deposit in contemplation of law. Thus, in the Roman law, if a man went from home leaving the keys of his house with his neighbour, the bailee of the keys was considered to be the depositary of the house. If a creditor holding a pledge receives payment of the debt, but continues to hold the pledge, he becomes a depositary thereof for his former debtor. If a tradesman sells any specific chattel, but neglects to deliver it, he becomes a depositary for the purchaser. But a man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will. Thus, if a tradesman anxious to sell his wares and merchandise sends them to my house without any previous communication with me, and without having obtained my previous consent, and they are taken in by my servant, in my absence, or without my knowledge, I do not by reason thereof become the depositary of the goods, and clothe myself with the care of them (*c*).

Liabilities of the depositary—Negligent keeping—Ordinary casualties.—A depositary is only bound to take that care of things accepted by him to keep, which a reasonably prudent man takes of his own property of a like description (*d*). He will be liable to make compensation to the owner, if the goods are stolen, damaged, or lost by reason of gross negligence in the keeping of them; but he is not responsible for slight neglect or ordinary casualties (*e*). "He shall stand charged or not charged, according as default or no default shall be in him" (*f*). But if he is guilty

(*c*) *Lethbridge* v. *Phillips*, 2 Stark. 544.

(*d*) *Giblin* v. *McMullen*, L. R. 2 P. C. 317; 38 L. J. P. C. 25.

(*e*) *Coggs* v. *Bernard*, 2 Raym. 913; *Lane* v. *Cotton*, 1 *ib.* 655; *Southcote's case*, 4 Co. 83, b.; 1 Smith's L. C. 5th ed. 175; Dig. lib. 16, tit. 3, 32; Domat. lex 1, tit. 7, s. 3, 4; Dig. lib. 50, tit. 16, 223; *Jones* v. *Lewis*, 2 Ves. sen. 240; *Taylor* v. *Caldwell*, *ante*, p. 295.

(*f*) Doct. & Stud. ch. 38.

of gross negligence, it is no answer to say that he lost his own goods at the time he lost the goods of the bailor (*g*). Thus, where a coffee-house keeper took charge of a sum of money, and put it with a larger sum of money of his own into his cash-box, which he left in the public tap-room of his coffee-house, from whence it was stolen, it was held that the circumstance of his having lost his own money together with the deposit would not exculpate him from the charge of gross negligence (*h*). Where a livery-stable keeper undertakes for reward to receive a carriage and lodge it in a coach-house, he is bound to take reasonable care that the building in which it is placed is in a proper state, so that the carriage may be reasonably safe in it; but there is no implied warranty on his part that the building is absolutely safe, and the fact that the building has been erected for him on his own ground makes no difference in his liability (*i*). If a man takes charge of money, and leaves it upon a shelf, or in an open drawer in a place of public resort, when he might have placed it under lock and key, this is a want of care inconsistent with good faith, and amounts, consequently, to gross negligence. If a package or a box, sealed or locked, be deposited, and the depositary is not made acquainted with the contents, he is bound only to take that care of the article which its general appearance seems to require; and in case it should be lost or destroyed through gross neglect, he will only be liable to the extent of the apparent value of the article, without reference to the contents; but, if he is made acquainted with the contents—if he is told that the box contains gold or jewels, glass or china, of great value—he is then bound to exercise a degree of care proportioned to the proper keeping of such articles; and, if he then exposes the box in unsafe places, or subjects it to improper treatment, and the contents are damaged or destroyed, he must make compensation to the owner to the full extent of the injury sustained (*k*). Where property is deposited with bankers gratuitously, they are only liable for gross negligence (*kk*). An executor stands in the position of a gratuitous bailee in respect of the assets (*l*).

Passenger's luggage deposited in cloak-rooms.—In the absence of any condition limiting their liability, railway companies are ordinary warehousemen of luggage deposited with them; but the companies almost always give a ticket where passenger's luggage is deposited in a cloak-room, and this ticket contains the terms of

(*g*) *Doorman* v. *Jenkins*, 2 Ad. & E. 258.

(*h*) *Doorman* v. *Jenkins*, 2 Ad. & E. 258; 4 N. & M. 170.

(*i*) *Searle* v. *Laverick*, L. R. 9 Q. B. 122.

(*k*) *Bonion's case*, Pasch. 8 Edw. 2; Mayn. Year Book, 275; Fitz. Abr. Detinue, 59; Erst. Inst. B. 3, tit. 1, s. 27, p. 493; Domat, dep. 1, 17; Dig. lib. 16, lex 1, s. 41.

(*kk*) *Giblin* v. *M'Mullen*, L. R. 2 P. C. 317

(*l*) *Job* v. *Job*, 6 Ch. D. 562.

the contract of bailment. Before the company can rely upon these terms they must be shown to have been present to the mind of the depositor, or that he had reasonable notice of their existence (*m*).

Carelessness on the part of the depositor in selecting a person notoriously unfit to be trusted.—The law, however, expects a depositor to exercise a reasonable amount of vigilance in the protection of his own interests; and, if he will blindly deposit goods in the hands of a person of weak intellect, or a child, or a minor without experience, or a notoriously idle and careless, or drunken fellow, he cannot expect the same care from them as from a prudent and cautious housekeeper. If the goods are injured or lost by the gross negligence of such depositaries, he must bear the consequence of his own rashness and folly, and put up with the loss (*n*).

Theft by the servant of the depositary.—If a servant steps out of the course of his employment to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. Thus, if I employ a servant to work in my house, and he carries off the property of a visitor or guest, I am not answerable for the loss. "If one man desire to lodge with another that is no common hostler, and one that is servant to him that he lodgeth with robbeth his chamber, the master shall not be charged with the robbery" (*o*). If the servant of the depositary negligently leaves the door of a house or warehouse open, and thieves avail themselves of the opportunity thus afforded them to enter the house and steal the deposit, the depositary is not responsible for the theft (*p*). It is laid down by Holt, C.J., that "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master; and then the act of the servant is the act of the master" (*q*). If, therefore, a servant "quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act" (*r*). It is the custom of bankers to receive and keep for the accommodation of their customers boxes of plate and jewels, wills, deeds, and securities; and, as no charge is made for the keeping of these things, they are, as we have seen, gratuitous deposits. The bankers, therefore, are not bound to take even ordinary care of

(*m*) *Parker* v. *S. E. Ry.*, 2 C. P. D. 416; *Henderson* v. *Stevenson*, L. R. 2 Sc. Ap. Cas. 470; *Harris* v. *Gt. Western Ry.*, 1 Q. B. D. 515; *Burke* v. *S. E. Ry. Co.*, 5 C. P. D. 1.

(*n*) *Quia, qui negligenti amico rem custodiendam tradit, sibi ipsi et propriæ fatuitati hoc debet imputare*; Brac. lib. 3, 99 b.; Inst. lib. 3, tit. 16, s. 3; Dig. lib 16, tit. 3, 32; Holt, C. J., *Coggs* v. *Bernard*, 2 Raym. 914, 915.

(*o*) Doct. & Stud. ch. 42; *Gayford* v. *Nicholls*, 9 Exch. 702.

(*p*) *Dansey* v. *Richardson*, 3 Ell. & Bl. 169.

(*q*) *Middleton* v. *Fowler*, 1 Salk. 282.

(*r*) Lord Kenyon, *M'Manus* v. *Crickett*, 1 East, 107; *Reedie* v. *Lond. & North West. Ry. Co.*, 4 Exch. 244; *Peachey* v. *Rowland*, 13 C. B. 182.

them; and, if they are stolen by a clerk or servant employed about the bank, the bankers are not responsible, unless they have knowingly hired or kept in their service a dishonest servant. Where a large quantity of doubloons locked up in a chest was deposited in the vaults of an American bank, and the bankers, who received the chest to keep as depositaries without reward, gave the owner a receipt acknowledging that the chest had been "left at the bank for safe keeping," and a clerk in the bank opened the chest and abstracted 32,000 doubloons, and then absconded, having also robbed and defrauded the bank, it was held by the American court that the bankers were not responsible for the theft (s).

Of the use and enjoyment by the depositary of the subject-matter of the deposit.—A depositary has no right to make use of the deposit for his own benefit and advantage; if he does so, and the thing is lost or injured, or deteriorated in value, through such user, the depositary must make good the loss (t). If, however, the subject-matter of the bailment is a living animal, such as a hound or a horse, which requires air and exercise, the bailee has an implied authority from the owner to use it to a reasonable extent, and is under an implied engagement to give it proper air and exercise. If a sum of money is bailed by one man to another under circumstances fairly leading to the presumption that the bailee has authority from the bailor to use it or not as he may think fit, the bailee will stand in the position of a mere depositary or he will be clothed with the increased duties and liabilities of a borrower, according as he may or may not have thought fit to avail himself of the privilege of user impliedly accorded to him. If he puts the money into a coffer or bag, and refrains from using it, and so preserves its identity, with the intention of restoring it *in individuo* to the bailor, he undertakes the duty of a mere depositary (u), and is bound only to take the same care of the deposit that a reasonable man would bestow upon his own money, and will not be responsible for loss by robbery, fire, or any other casualty. But, if he were to mix the sum deposited with his own money with the intention of restoring an equivalent, and so to destroy the identity and individuality of the subject-matter of the bailment, this would be a user of the money which would at once alter the nature and character of the bailment, converting it into a loan for use and consumption with its increased duties and responsibilities (x). Where corn was deposited by a farmer with

(s) *Foster* v. *Essex Bank*, 17 Massach. 479; *Giblin* v. *McMullen*, L. R. 2 P. C. 318; 38 L. J. P. C. 25; *ante*, p. 356.

(t) In the Roman law the unauthorised use of the deposit amounted to a gross breach of trust; Instit. lib. 4, tit. 1, s. 6; Cod. lib. 4, tit. 34, 3; Dig. lib. 16, tit. 3, 29.

(u) Dig. lib. 16, tit. 3, 1, s. 34.

(x) Dig. lib. 12, tit. 1, 4; Inst. lib. 3, tit. 15, s. 2.

a miller, to be used as part of the miller's current consumable stock, subject to the right of the farmer to claim at any time an equal quantity of wheat of similar quality, or, in lieu thereof, the market price of such quantity, it was held that this was a sale and not a bailment (*y*).

Transfer of the deposit to a stranger—Remedy of the depositor.—If a depositary commits a breach of trust, and sells or wastes the deposit, the depositor may maintain an action against the purchaser for the recovery of the value of the deposit if the latter neglects to yield it up on demand (*z*), unless the thing has been purchased in market overt (Add. on Torts, 5th ed. by Cave, p. 415). If the goods are bailed by A. to B., to be kept by the latter, and B. bails them to C., who uses and wastes the goods, C. is liable to an action at the suit of A. for the recovery of compensation for the damages sustained (*a*). Where a depositary has wrongfully sold the goods deposited with him, the bailor may sue him immediately for the conversion. If he does not discover the conversion until after the lapse of six years, he is, nevertheless, entitled to sue the depositary for refusing to deliver up the goods, and the statute of limitations will run only from the refusal to deliver on request, and not from the sale (*b*).

Restoration of the deposit—The depositary is bound to deliver up the deposit to the owner on demand, although the latter may be an entire stranger to him. Where a pony-chaise was bailed to a workman to be painted, and the latter deposited it in the hands of a party who refused to deliver it up to the owner unless the latter produced either the person who actually deposited the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property without doing either the one or the other (*c*) The bailee has no better title than the bailor; and, consequently, if a person entitled to the property as against the bailor claims it, the bailee must give it up to him (*d*).

Joint and several deposits.—Where goods and chattels are deposited in the hands of a bailee by the concurring will of several joint owners, one of them has no right to demand them back without the authority of all the joint depositors. If some of them ask the bailee to return the property, and others desire him to keep it, the bailee is not liable to an action at the suit of those who require him to return it (*e*). If goods and chattels, deeds or securities

(*y*) *South Australian Ins. Co.* v. *Randall*, L. R. 3 C. P. 101.

(*z*) *Cooper* v. *Willomat*, 1 C. B. 672; *Fenn* v. *Bittleston*, 7 Exch. 159; *White* v. *Spettigue*, 13 M. & W. 603.

(*a*) 12 Ed. 4, fol. 13, pl. 9; fol. 9, pl. 5; *Loeschman* v. *Machin*, 2 Stark. 311.

(*b*) *Wilkinson* v. *Verity*, L. R. 6 C. P. 206; 40 L. J. C. P. 141.

(*c*) *Buxton* v. *Baughan*, 6 C. & P. 674.

(*d*) *Biddle* v. *Bond*, 6 B. & S. 225; 34 L. J. Q. B. 137; *Batut* v. *Hartley*, L. R. 7 Q. B. 594. See, however, *Ex parte Davies*, 19 Ch. D. 86, *post*, p. 467.

(*e*) *Attwood* v. *Ernest*, 13 C. B. 889; 22 L. J. C. P. 225.

are deposited by two persons jointly in the hands of a third to be kept, it is not in the power of one of them alone, without the concurrence of the other, to take them out of the hands of the bailee (*f*). If the bailee is bound by his contract to deliver the goods to the two jointly, his refusal to deliver them on the demand of one party alone is not a conversion, nor is his detention from such one party an unlawful detainer. But, if an action is brought by several joint bailors against the bailee for non-delivery of the goods, it is a good defence to the action that the goods have been delivered up to one of them (*g*). When the deposit is not a joint deposit founded on a joint contract, but is made by one of several joint owners, the depositor may sue alone, "as, if a charter be made to four, and one of them bails the charter to keep, he alone, without the others, may bring detinue" (*h*). And, wherever several joint owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (*i*).

Transfers of the subject-matter of the bailment—Adverse claimants.—When chattels have been bailed, to be holden by the bailee at the disposal of the bailor, a question often arises as to the nature and extent of the liabilities of the bailee to persons who claim to be the owners of the chattels by sale or mortgage from the bailor. If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorised by him to receive them, a *boná fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and, in case of the refusal of the latter to deliver them to him, may maintain an action for their recovery, the bill of sale or mortgage signed by the bailor being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee.

Eviction by title paramount.—Where the plaintiff brought an action against the defendant for a breach of his promise to return a horse sent to him by the plaintiff, and the defence was that S. was the owner of the horse and had forcibly taken it away from the defendant, it was held that this was a discharge of the de-

(*f*) *May* v. *Harvey*, 13 East, 197, Thel. Dig. lib. 11, cap 47; Jones's Bailments, 50; Noy's Life, appended to Noy's Maxims, 8th edit. 1821.

(*g*) *Burke* v. *Bryant*, Addison on Torts, p. 350; *Brandon* v. *Scott*, 7 Ell. & Bl. 237; 26 L. J. Q. B. 163; *Watson* v. *Evans*, 1 H. & C. 664; 32 L. J. Ex. 137.

(*h*) Thel Dig. lib. 11, cap. 47, s. 8; *Broadbent* v. *Ledward*, 11 Ad & E. 211.

(*i*) Martin, B., *Walshe* v. *Provan*, 8 Exch 852.

fendant's promise, it being analogous to an eviction of a lessee by title paramount (k). So, where a bailor mortgages a chattel bailed, and the mortgagee has a right to demand possession from the bailee and does demand it, the latter may refuse to give the chattel up to the bailor (l).

Stakes in the hands of stakeholders to abide the event of a lawful game.—If money has been deposited in the hands of a stakeholder to abide the event of a lawful game or race, and then to be paid over to the winner, the stakeholder holds the money as agent of the winner, and is bound on demand to pay it over to him (m). But, if the party is not strictly a stakeholder holding money in that character, but receives it as agent for a known principal, he is accountable only to the latter for the money (n). If the deposit has been made by two persons jointly, it cannot, as we have seen, be revoked and the thing deposited be demanded back by one of them alone. If a valid and binding contract is made between A. and B. for the performance of some act or duty by B. by an appointed day, or within a reasonable time after the making of the contract, and for the payment of money by A. to B. on the act being done, and the sum to be paid is, by the mutual agreement of the parties, deposited by A. in the hands of C., to be paid over to B. on the performance of his contract, and in default to be returned to A., the deposit cannot be revoked and the money demanded back from the stakeholder by A. without the consent of B. (o), unless the transaction is illegal (p). As soon as the stakeholder has received the deposit, he is bound to hold it to abide the event, and must not pay it over to either party until the condition upon which it was made payable or returnable has been accomplished. Thus, where an auctioneer has received a deposit from the purchaser of an estate, to be paid over to the vendor if a good title to the property is made out by the latter, and, in default thereof, to be returned to the intended purchaser, the latter has no right to demand back the deposit, and the auctioneer is not justified in returning it, without the consent of the vendor. But, if the vendor is not able to establish his title, or the contract is rescinded or abandoned by the mutual consent of the contracting parties, the auctioneer then holds the deposit for the use, and at the disposal, of the party from whom he received it, and is bound

(k) *Shelbury* v. *Scotsford*, Yelv. 23; Littledale, J., *Wilson* v. *Anderson*, 1 B. & Ad. 457; *Biddle* v. *Bond*, 34 L. J. Q. B. 137; 6 B. & S. 225. See, however, *Ex parte Davies*, *post*, p. 467.

(l) *European & Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 30 L. J. C. P. 247.

(m) *Applegarth* v. *Colley*, 10 M. & W. 733.

(n) *Bamford* v. *Shuttleworth*, 11 Ad. & E. 926; *Edgell* v. *Day*, L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(o) *Marryat* v. *Broderick*, 2 M. & W. 372; *Emery* v. *Richards*, 14 M. & W. 728; 15 L. J. Ex. 49.

(p) *Post*, p. 1156: *Eltham* v. *Kingsman*, 1 B. & Ald. 683.

to return it on the request of the latter (*q*). So long as the contract between the parties interested in the deposit remains open, and the event is undetermined, the right to the deposit remains in suspension, and each of the parties has an equal interest in the due fulfilment of the trust by the stakeholder. Stewards of a horse-race do not stand in the position of arbitrators between the persons who have horses in the race; and it is not necessary that they should meet together and come to a joint decision as to which horse has won, to enable the winner to recover the stakes (*r*).

If the deposit has been made to abide the event of a wager, or for the purpose of carrying into effect an unlawful transaction, the depositor may, as we shall see, at any time before the event has happened or the deposit has been paid over, demand it back and maintain an action for its recovery (*s*).

Power of the depositary to compel rival claimants to establish their title by interpleader.—If the event, when it does transpire, is not of a decisive character, and both parties set up a title to the deposit, the depositary may compel them to interplead, and so establish the right. This may be done when the depositary claims no interest in the deposit, and is not colluding with either party (*t*). A stakeholder may also pay money into court under the Trustee Relief Act (*u*).

Liabilities of the depositary when he holds possession wrongfully.—If the depositary is in default in neglecting to return the chattel on demand, he is responsible for the subsequent loss or destruction of the article, and for all injuries that may afterwards happen to it, by whatever means occasioned. He must restore it, moreover, with all its increase and profits. Thus, he who has taken charge of a flock of sheep must restore the wool shorn from their backs and the lambs they have produced, together with the sheep themselves; and, if the profits, produce, and increase are of a perishable nature, such as milk, eggs, and butter, and have been necessarily sold, the produce of the sale must be paid to the depositor. The depositary, however, cannot be called upon to deliver up the accessary without the principal. If the depositor turns out to be a thief and to have stolen the things deposited, and the true owner appears, the depositary must restore them to the latter (*x*).

(*q*) *Burrough* v. *Skinner*, 5 Burr. 2639; *Edwards* v. *Hodding*, 5 Taunt. 815; *Gray* v. *Gutteridge*, 1 M. & R. 614; *Duncan* v. *Cafe*, 2 M. & W. 246.

(*r*) *Parr* v. *Winteringham*, 1 Ell. & Ell. 394; 28 L. J. Q. B. 123.

(*s*) *Post*, p. 1156; *Holmes* v. *Sixsmith*, 7 Exch. 802; 21 L. J. Ex. 312.

(*t*) *Crawshay* v. *Thornton*, 7 Sim. 398; *Pearson* v. *Cardon*, 2 Russ. & M. 606; *Tanner* v. *The European Bank*, L. R. 1 Ex 261; 35 L. J. Ex. 151: *Nelson* v. *Barter*, 23 L. J. Ch. 705; 2 H. & M. 334; *Attenborough* v. *St. Katherine's Dock*, 3 C. P. D. 450, C. A.; 23 & 24 Vict. c. 126. s. 12.

(*u*) *United Kingdom Life Assurance Co., In re*, 34 L. J. Ch. 554.

(*x*) Domat (du dépot), s. 4, s. 2; s. 1, s. 5 Dig. lib. 16, tit. 3.

Liabilities resulting from the taking possession of goods by finding.—A man may clothe himself with the ordinary obligations and liabilities of a depositary by finding and taking possession of the lost property of another as well as by receiving property direct from the hands of the owner. In Noy's Maxims, it is observed, (ch. 43), "If one man finds goods of another, and they be hurt or lost by the negligence of him who found them, he shall be liable to make them good to the owner." So, in Doctor and Student, it is said, "If one man finds goods of another, and they be after hurt or lost by wilful negligence, he shall be charged to the owner. But, if they be lost by other casualty, as if they be laid in a house that by chance is burned, or if he deliver them to another to keep that runneth away with them, I think he be discharged" (*y*). "When a man doth find goods," further observes Lord Coke, "it has been said, and so commonly held, that, if he doth dispossess himself of them, by this he shall be discharged; but this is not so, as appears by the 12 E. 4, fo. 13. For he who finds goods is bound to answer for them to him who hath the property; and, if he deliver them over to any one, unless it be to the right owner, he shall be charged for them; for at the first it is in his election whether he will take them or not into his custody, but, when he hath them, he ought to keep them safely; and, if he be wise, he will search out the right owner of them, and deliver them to him. An action on the case lieth against him for ill and negligent keeping" (*z*). So by the civil law, if the finder of a lost article took the thing lost into his possession, he was obliged to take care of it and preserve it for the owner. He was deemed, moreover, to be guilty of a theft, if he made no attempt to discover the owner and restore the lost property, or if, knowing the owner, he kept the property without any intention to restore it (*a*).

Liabilities of the depositor.—The depositor is by the Roman law bound to re-imburse the bailee all extraordinary expenses incurred by him in the preservation of the thing committed to his keeping; and such a liability may, under certain circumstances, exist in our own law. The French law, moreover, concedes to the depositary a right to detain the chattel until he has received payment of such expenses (*b*). But no such right exists in the common law, and no depositary is ever permitted in this country to set up a right of lien upon the chattel for the mere expenses he has incurred in keeping and preserving it.

Deposits of money with one of several partners.—A receipt of

(*y*) Dial. 2, ch. 38; Story, 64, 65.
(*z*) *Izaack* v. *Clark*, 2 Bulst. 312.
(*a*) Dig. lib. 47, tit. 2, lex 43, s. 4; as to recovering the halves of bank notes, see *Smith* v. *Mundy*, 29 L. J. Q. B. 172.
(*b*) Pothier (DEPOT), No. 59; (OBLIGATIONS) No. 625, Cod. Civ. art. 1948.

money by one partner on account of the firm, in the ordinary course of the business of the co-partnership, is the receipt of the co-partnership at large; and all the partners are individually responsible for the proper application of the money deposited (c). If two solicitors in partnership together are in the habit of receiving money to place out on securities, and one of them receives a sum of money to be laid out on security, the other is responsible for the proper application of the money, although the party receiving it gives his own separate receipt for it, making himself individually accountable for the amount on demand (d). But it must be proved that the client relied on the joint judgment and joint security of the firm, and that it was part of the ordinary course of business of the firm to receive and hold money until a good mortgage security offered, and then invest it; for it is no part of the ordinary business or duties of solicitors to receive and hold money for general purposes of investment (e). Where one of a firm of solicitors received from a client a sum of money, for which a receipt was given in the name of the firm, stating that part of the money was in payment of certain costs due to the firm, and that the residue was to make arrangements with the client's creditors, and the solicitor misappropriated the money, it was held that the transaction with the client was within the scope of the partnership business, and that the partners in the firm were jointly and severally liable to make good the amount (f). If one of several partners in trade obtains money in the ordinary course of dealing of the co-partnership, but by means of false and fraudulent representations, and converts the money, when received, to his own use in fraud of his partners, the partnership is nevertheless responsible for the moneys so received in the name of the firm; and an innocent partner may, consequently, be as much bound by such fraudulent acts and transactions as if he himself had personally been a party to them (g). But, if the fraud has not been committed in the course of the partnership dealings, but in the private and separate transactions of the single partner himself with third parties, the innocent partner cannot be made responsible to those who have been defrauded in the course of such transactions. Thus, if a partner who holds money in his hands as a trustee for third parties, brings that money into the partnership account, and

(c) *Dundonald* v. *Masterman*, L. R. 7 Eq. 504; 38 L. J. Ch. 350, *St. Aubyn* v. *Smart*, L. R. 3 Ch. 646.

(d) *Willet* v. *Chambers*, 2 Cowp. 814.

(e) *Harman* v. *Johnson*, 2 Ell. & Bl 61; 22 L. J. Q. B. 297, *Plumer* v *Gregory*, L. R. 18 Eq. 621: *Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. D. 394, and see *post*, p. 379.

(f) *Atkinson* v. *Macreth*, L. R. 2 Eq. 570, 35 L J Ch. 624.

(g) *Rapp* v *Latham*, 2 B. & Ald. 795; *Stone* v *Marsh*, R. & M. 368; 6 B. & C. 551; *Keating* v. *Marsh*, 1 Mont. & Ayr. 582

employs it in the business as his own money, the other partners cannot be made responsible for the repayment of the money so employed in the business, unless they knew at the time that the money was trust money, and not the property of their co-partner (*h*). But, if money is deposited in the hands of one of several partners of a banking firm at the bank, to be held temporarily by the bank, and subsequently applied in the purchase of some particular security, and the partner absconds with the money, the firm is responsible for the re-payment of the amount, although they had given no authority to their partner to receive money for investment, and the transaction, so far as it related to the application of the money when received, was not in the ordinary course of business (*i*). And, where the senior partner of a firm of stock-brokers bought transferable bonds for the plaintiff, and kept the bonds for him, and afterwards sold them, and made away with the money, it was held that the firm was responsible to the plaintiffs for the value of the bonds, although the junior partners were entirely ignorant of the transaction (*k*).

Deposits of money with bankers.—Money deposited in the hands of bankers in the ordinary course of business is money lent to the banker by the depositor, with a superadded obligation that it is to be repaid when called for by cheque. If interest is to be paid by the banker, the transaction amounts to a letting and hiring of the money or a loan at interest; if no interest is to be paid on the deposit, it is a *commodatum* or gratuitous loan; and in this last case, if the money remains for six years in the banker's hands without any payment by him of any part of the principal, or any acknowledgment by him in writing of the existence of the loan and of the debt, the statute of limitations will be a bar to its recovery by action (*l*). In ordinary cases of deposits of money with bankers the transaction amounts to a *mutuum* or loan for use and consumption, it being understood that the banker is to have the use of the money in return for his consent to take charge of it (*m*). "Money, when paid into a bank, ceases altogether to be the money of the depositor; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it or ordered to pay it. It is the banker's money; he deals with it as his own; he makes what profit he

(*h*) *Ex parte Heaton*, Buck, 386; *Smith* v. *Jameson*, 5 T. R. 601.

(*i*) *Thompson* v. *Bell*, 10 Exch. 10; 23 L. J. Ex. 321.

(*k*) *La Marquise de Ribeyre* v. *Barclay*, 23 Beav. 125; 26 L. J. Ch. 747.

(*l*) *Pott* v. *Clegg*, 16 M. & W. 321; 16 L. J. Ex. 210; *Howard* v. *Danbury*, 2 C. B. 806.

(*m*) Alderson, B., *Roberts* v. *Tucker*, 16 Q. B. 575; *Pott* v. *Clegg*, 16 M. & W. 321; 16 L. J. Ex. 210; *Sims* v. *Bond*, 2 N. & M. 608.

can of it, which profit he retains to himself, paying back only the principal sum, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places." The money, therefore, being his own, he is guilty of no breach of trust in employing it. He is not answerable to the principal if he puts it in jeopardy by engaging in hazardous speculations; but he is, of course, answerable for an equivalent amount to be paid to his customer when demanded (*n*).

Deposit of bills, notes, and securities in the hands of bankers.— But bills deposited in the hands of a banker remain the property of the customer, unless there be a special agreement transferring the property in them to the banker, so that, upon the death or failure of the banker, the customer has a right to the bills so long as they remain *in specie;* but the banker has a lien upon them, if the customer has overdrawn his account (*post*, p. 375). Where a customer was in the habit of depositing bills with his bankers, which bills were indorsed by him, and were entered in the bank books to his credit as *bills*, not as cash, and after such entry the customer was allowed to draw to the full amount of such bills by cheques, and the bankers became bankrupt, it was held that the customer, who had a cash balance in his favour at the time of the bankruptcy, was entitled to the bills, there being no evidence that he had agreed that, when the bills were deposited, they were to become the property of the bankers (*o*). And, where a customer paid a bank-note into the bank after the ordinary hours of business, and the bankers, having previously resolved to stop payment, did not carry the amount of the note to the customer's account, but placed it aside in a separate place of deposit, taking care not to mix it with the general assets of the house, it was held that the note still remained the property of the customer (*p*). If bank-notes deposited by a customer turn out to be worthless paper, by reason of the insolvency of the bank which issued the notes, the loss falls upon the customer, if there has been no laches on the part of the banker with whom the notes were deposited. If the banker gives a receipt for the notes as cash, he is not precluded by such receipt from subsequently showing that what he received was not cash, but spurious paper (*q*).

Receipt of cheques by bankers on account of their customers.— When a cheque is paid into a bank to be placed to the account of a

(*n*) *Foley* v. *Hill*, 2 H. L. C. 36; *ante*, p. 346.

(*o*) *Thompson* v. *Giles*, 3 D. & R. 733; 2 B. & C. 422.

(*p*) *Sadler* v. *Belcher*, 2 Mood. & Rob. 489; *ante*, p. 366; *post*, p. 369.

(*q*) *Timmins* v. *Gibbins*, 18 Q. B. 722; 21 L. J. Q. B. 403.

customer, the banker is bound to use due diligence in getting the cheque paid, and must give prompt notice to his customer in case it is not paid; and, if he omits to do either of these things, he makes the cheque his own, and must bear the loss, if loss there be. Where the plaintiff received a cheque drawn upon his own bankers, and took it to their bank, and handed it to a clerk, with directions to place it to his account, and the clerk received the cheque without any observation, and the bankers, finding that the drawer of the cheque had overdrawn his account and was keeping out of the way, gave the plaintiff notice on the following day that the cheque would not be honoured by them, and that the amount of it would not be placed to his credit, it was held that the bankers were not precluded, by their having received the cheque without comment in the first instance, from subsequently refusing to credit the plaintiff with the amount; but that, if the plaintiff, at the time he deposited the cheque, had asked the bankers whether they would pay it, he would have been entitled to an answer, and that the bankers would have been bound by such answer (*r*). It is often impossible to ascertain till the close of the day at the clearing-house what sums of money may be paid in to each particular account, and what are the drafts upon it; and bankers, therefore, may receive cheques drawn upon them by their customers, and may reserve to themselves the right of honouring them, or not honouring them according to the result of the day's transactions at the clearing-house. Where bankers, at the time of receiving a cheque drawn upon them by one customer and presented by another, stated that they were not then in funds, but that they would keep the cheque in the hope of being furnished with money to pay it in the course of the day, it was held that they were bound to appropriate the first money they received from their customer to the drawer, in satisfaction and discharge of such cheque (*s*).

Of the duty of bankers to honour the drafts of their customers—Payment of cheques.—It is the duty of the banker to pay the debt due to the customer pursuant to the order, cheque, or draft of the latter. The customer may order the debt to be paid to himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of any other person he pleases. He may do so by written instrument or verbal direction; but the banker is entitled to require some written evidence of the order for the transfer (*t*). The banker is bound by law to honour the cheques and drafts of his customers, provided they are

(*r*) *Boyd* v *Emmerson*, 2 Ad & E. 202

(*s*) *Kilsby* v. *Williams*, 5 B. & Ald. 819.

(*t*) *Watts* v. *Christie*, 11 Beav. 546; 18 L. J. Ch. 173.

presented within banking hours, and provided he has in his hands sufficient funds for the purpose belonging to the customer (*u*); and, if he refuses he is liable to an action by the customer for substantial damages, without proof of actual damage; for it is a discredit to the customer to have his cheque refused payment (*x*). Where the plaintiff paid a sum of money to a banker in London, and directed him to forward the money to certain country bankers to the plaintiff's credit by a particular day, and the London banker received the money and neglected to forward it, it was held that he was responsible for all damages sustained by the plaintiff by reason of his not having the money at the time and place appointed (*y*). The acceptance by a customer of a bill of exchange payable at his bankers is tantamount to an order from him to his banker to pay the bill to the person who, according to the law merchant, is capable of giving a good discharge for it, *i.e.*, to a person who becomes the holder by a genuine indorsement, or, if the bill is originally payable to bearer, or if there is afterwards a genuine indorsement in blank, to the person who seems to be the holder (*z*). If bankers have indorsed a bill of exchange accepted by a customer, and the bill is presented to them when it arrives at maturity, and they pay it on the day it becomes due, the bankers so paying may reserve to themselves the right to examine into the state of the accounts between them and the acceptor, their customer, and determine whether they honour the bill for the acceptor, or take it up on their own account as indorsers (*a*). As to determination of authority of bankers, see sect. 75 of Bills of Exchange Act in Appendix.

Payment of cheques under suspicious circumstances—Negligence.—If bankers pay a cheque under circumstances of suspicion which ought to have put them on their guard and induced them to make inquiry before paying it, they cannot debit the customer with the amount, if the cheque was never uttered or put into circulation by the customer. Thus, where the customer, finding that he had drawn a cheque for a wrong sum, tore it into four pieces and threw them away, and these four pieces were picked up, and neatly pasted together, and presented at the bank by a stranger for payment, but the rents and the pasting of the paper were quite visible, and the face of the cheque was soiled and dirty, and the cashier,

(*u*) *Agra Bank, &c.*, v. *Hoffman*, 34 L. J. Ch. 285.

(*x*) *Marzetti* v. *Williams*, 1 B. & Ad. 424; *Rolin* v. *Steward*, 14 C. B. 595; 23 L. J. C. P. 148; *Boyd* v. *Emmerson*, 2 Ad. & E. 184; *Whitaker* v. *Bank of Eng.*, 1 C. M. & R. 744; *Cumming* v. *Shand*, 5 H. & N. 95; 29 L. J. Ex. 129; as to orders on bankers operating by way of NOVATION AND SUBSTITUTION, see *post*, p. 1229

(*y*) *Shillibeer* v. *Glynn*, 2 M. & W. 143, *Wheatley* v. *Low*, Cro. Jac. 668; *Low's case*, Palm. 281.

(*z*) *Kymer* v. *Laurie*, 18 L. J. Q. B. 218, *Robarts* v. *Tucker*, *post*, p. 372.

(*a*) *Pollard* v. *Ogden*, 2 Ell. & Bl. 464; 22 L. J. Q. B. 439.

nevertheless, paid it without demur or inquiry, it was held that the bankers had been guilty of a neglect of duty, and could not, under the circumstances, debit their customer with the payment (*b*). But, if the tearing is done in such a way that it is reasonable to presume it to have been done for the purpose of transmitting the cheque through the post, there will then be no neglect of duty on the part of those who pay the cheque in ignorance of its having been torn up with the intention of cancelling it (*c*).

Joint accounts and joint deposits with bankers.—Where money is paid into a bank to the joint account of several persons *nominatim*, it cannot be drawn out by one of them alone; for the bankers are not discharged from liability by payment to one of the depositors without the authority of the others (*d*). But, when one dies, the money may be drawn out by the survivor. Such is the case with money deposited in a bank in the joint names of husband and wife (*e*).

Deposits and accounts with bankers in the names of trustees, agents, and receivers.—In a banking account of the ordinary kind between a banker and his customers it is not competent to any third party to interpose and to say that the customer was his agent, and that the banker has contracted with such third party through the medium of such customer, his agent. All cheques and money paid into the bank by the customer are, as between the banker and the customer, the cheques and money of the customer, whoever may be the real owner of them. If the owner of the cash allows his agent to deal with it as his own, and pay it into the bank in his own name, he has no power over it after it has reached the banker's hands. On the other hand, it is not competent to the banker, after he has placed the money to the credit of the customer to deny the title of the latter to the money, and to set up a *jus tertii*, or to revoke the credit (*f*). If several joint owners of a sum of money allow one of them to deal with their money and place it in the hands of a banker to his separate account, the banker must treat that as a contract with the one individual dealing with him, and the latter cannot impose upon the banker as many contracts as there are owners of the money (*g*).

Separate accounts opened by the same person in different capacities.—Generally, as between banker and customer, the banker looks only to the customer in respect of the account opened in that customer's name, and whatever cheques that customer chooses

(*b*) *Scholey* v. *Ramsbottom*, 2 Campb. 485.

(*c*) *Ingham* v. *Primrose*, 28 L. J. C. P. 294.

(*d*) *Innes* v. *Stephenson*, 1 Mood. & Rob. 147; *Sims* v. *Brittain*, 4 B. & Ad. 375.

(*e*) *Williams* v. *Davies*, 33 L. J. P. & M. 127.

(*f*) *Tassell* v. *Cooper*, 9 C. B. 533.

(*g*) *Sims* v. *Brittain*, 4 B. & Ad. 375; *Pinto* v. *Santos*, 5 Taunt. 447.

to draw the banker is to honour, and is not to inquire what the moneys are that are paid into that account, or for what purpose they are drawn out. But, when the customer opens two separate accounts, the one being a private account of his own, and the other an account as trustee or receiver of the moneys of a known third party, the bankers are bound to take notice that the moneys placed to the last-named account are not the moneys of their customer, and they cannot make an arrangement with the latter for an appropriation of the balance in their hands on the fiduciary account to liquidate a balance due to them from their customer upon his own private account. They have no right to combine with the receiver for the appropriation of his principal's money to discharge the private debt due to them from the receiver; for no person dealing with another, and knowing him to have in his hands or under his control money belonging to a third person, can deal with the individual holding that money for his own private benefit, when the effect of the transaction is that a fraud is necessarily committed upon such third party (*h*).

Loss of trust-money in the hands of bankers.—If an agent or trustee who has received a sum of money for the use of his principal or beneficiary pays the money into a bank in the name of the principal or beneficiary, and places it to the account of the latter, the amount then remains in the bank at the risk of the principal; and if the banker fails the principal must bear the loss. But, if the agent or trustee pays in the money to his own account and his own credit, this is a user of the money for which he will be responsible. If he had an implied authority to use the money, and has so exercised it, then he stands, as before-mentioned, in the position of a borrower for use and consumption. In either case he is bound to make good the loss (*i*).

Payment of forged cheques, drafts, and orders on bankers—Forgery facilitated by the negligence of the customer.—See Bills of Exchange Act in Appendix. If money is drawn out of the bank by means of a forged order purporting to have been made by the customer, the banker must sustain the loss. Where a cheque drawn by a customer on his banker for a sum of money described in the body of the cheque in words and figures was afterwards altered by the holder, who substituted in a different handwriting a larger sum than that mentioned in the cheque, in such a manner that no one, in the ordinary course of business, would have observed it, and the banker paid the larger sum to the holder, it was held that he could not

(*h*) *Bodenham* v. *Hoskins*, 21 L. J. Ch. 864; 16 Jur. 721; *Bridgman* v. *Gill*, 24 Beav. 302; *Kingston, ex parte*, L. R. 6 Ch. 632; *per* Blackburn, J., *Bailey* v. *Finch*, L. R. 7 Q. B. 42; 41 L. J. Q. B. 83; *Ex parte Mercer*, 12 Ch. D. 491, C. A.

(*i*) *Robinson* v. *Ward*, R. & M. 276; *Wren* v. *Kirton*, 11 Ves. 377; *Rocke* v. *Hart*, *ib.* 61; *Massey* v. *Banner*, 4 Mad. 418, 419, 1 Jac. & Walk. 241.

lawfully debit the customer with the over-payment (*k*). But, if the banker has been defrauded through the carelessness or negligence of the customer in drawing the cheque, the loss must be borne by the customer. Where the customer signed several blank cheques and left them in the hands of his wife to be filled up, and she handed a cheque to a clerk to be filled up for 50*l*. 2*s*. 3*d*., and the clerk filled up the cheque for the specified amount, and showed it to the wife, but the "fifty" was commenced in the middle of the line, so that the words "three hundred and" could easily be written before it, and space was left at the bottom of the cheque for the insertion of the figure 3 between the £ and the figures 50, and the clerk on his way to the bank altered the cheque to 350*l*., and got that amount from the bankers and absconded, it was held that the customer must bear the loss, as it had been occasioned by his own negligence and the negligence of his agent in dealing with the blank cheque (*l*). Negligence in dealing with a cheque or draft must, in order to amount to an estoppel, be negligence in the transaction itself and the proximate cause of leading the third party into mistake, and must be a breach of some duty owing to such third party or to the public at large (*m*).

Forged indorsements.—We have seen that, if a bill of exchange has been accepted by a customer payable to order at his bankers, the acceptance of the bill is an authority to the bankers to pay the bill only to a person who becomes the holder by a genuine indorsement from such customer. If bankers wish to avoid the responsibility of deciding on the genuineness of the indorsement, they must require their customer to make his bills payable at his own offices, and to honour the bills by giving a cheque on them; for they cannot debit a customer with a payment made to a who claims through a forged indorsement and so cannot give valid discharge for the bill, unless there are circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or a subsequent admission on the part of the customer of the genuineness of the indorsement inducing the bankers to alter their position, so as to preclude the customer from showing it to be forged (*n*). But, by the 16 & 17 Vict. c. 59, s. 19, any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the

(*k*) *Hall* v. *Fuller*, 5 B. & C. 750; 8 D. & R. 464; as to advances by bankers, at the request of their customers on forged securities, see *Woods* v. *Thiedemann*, 1 H. & C. 478; or on securities fraudulently obtained, *Re Carew's estate*, 31 Beav. 39; 31 L. J. Ch. 214.

(*l*) *Young* v. *Grote*, 12 Moore, 489; 4 Bing. 257.

(*m*) *Arnold* v. *The Cheque Bank*, 1 C. P. D. 578; *Patent Safety Gun Cotton Co.* v. *Wilson*, 49 L. J. 713, C. A.

(*n*) *Robarts* v. *Tucker*, 16 Q. B. 578; sect. 24 of the Bills of Exch. Act in App.

person to whom the same shall be drawn payable, shall be sufficient authority to the banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on the banker to prove that such indorsement or any subsequent indorsement was made by and under the direction or authority of the person to whom the draft or order was or is made payable, either by the drawer or any indorser thereof; and see also sect. 60 of Bills of Exchange Act in Appendix. But this enactment does not extend to protect any other person who takes the cheque upon the faith of such forged indorsement (*o*). An indorsement of a cheque "per proc." or "as agent" is an indorsement by the payee within the statute, although the indorser has no authority to indorse (*p*)

Cheques paid by mistake—If a banker pays the cheque of a customer, supposing that he has funds, and afterwards finds that the customer has overdrawn his account, and that he has no funds, the banker cannot recover the money from the party who presented the cheque (*q*); but, if the cheque [illegible] not drawn on the banker, and the latter does not pay the ch[illegible] a banker honouring the draft of his customer, but in the same way as if he were giving change for a bank-note, all parties believing the cheque to be genuine, he can recover back the money he has paid, if it turns out to be forged and worthless (*r*).

Payment of cheques at branch banks—The different branch banks of a banking company are, as regards their separate customers, separate companies, so that a customer who k[illegible]ps an account with one branch has no right to draw cheques upon, and have them cashed by, another branch. They are also separate and distinct for many other purposes (*s*). But in principle they are agencies of one principal banking firm, although regarded as distinct for special purposes (*t*). Where a customer had an account with two branches of a bank, it was held that in the absence of any special agreement with their customer the bank had a right to consider the two accounts as one, and to refuse the customer's cheque when, on adding the two accounts together, the balance was against him (*u*).

Crossed cheques.—By the 39 & 40 Vict., c. 81, called "The Crossed Cheques Act, 1876"—the provisions of which are reproduced, with two slight additions, sect 77 (1) (6), in the Bills of Exchange Act, 1882, ss. 76—82, in Appendix—it is enacted by

(*o*) *Ogden* v. *Benas*, L. R. 9 C. P. 513; *Bobbett* v. *Pinkett*, *post*, p. 375.
(*p*) *Charles* v. *Blackwell*, 1 C. P. D. 548; 2 C. P. D. 151, C. A.
(*q*) *Chambers* v. *Miller*, 13 C. B N. S. 125; 32 L. J. C. P. 30
(*r*) *Woodland* v. *Fear*, 7 Ell. & Bl. 522.
(*s*) *Woodland* v. *Fear*, 7 Ell. & Bl. 521, 26 L. J Q. B. 202; *Clode* v. *Bayley*, 12 M. & W. 51.
(*t*) *Prince* v. *Oriental Bank Corporation*, 3 Ap Cas. 325.
(*u*) *Garnett* v. *M'Kewan*, L. R. 8 Ex. 10; 42 L. J. Ex. 1.

s. 3, that, in this Act, "cheque" means a draft or order on a banker payable to bearer or to order on demand, and includes a warrant for payment of dividend on stock sent by post by the Governor and Company of the Bank of England or of Ireland, under the authority of any Act of Parliament for the time being in force.

"Banker," includes persons or a corporation or company acting as bankers.

By sect. 4, where a cheque bears across its face an addition of the words "and company," or an abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, and either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition shall be deemed a crossing, and a cheque shall be deemed to be crossed specially, and to be crossed to that banker.

By sect. 5, where a cheque is uncrossed, a lawful holder may cross it generally or specially.

Where a cheque is crossed generally a lawful holder may cross it specially.

Where a cheque is crossed generally or specially, a lawful holder may add the words "not negotiable."

Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

By sect. 6, a crossing authorised by this Act shall be deemed a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing.

By sect. 7, where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or to his agent for collection.

By sect. 8, where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

By sect. 9, where the banker on whom a crossed cheque is drawn has in good faith and without negligence paid such cheque, if crossed generally to a banker, and if crossed specially to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque and (in case such cheque has come to the hands of the payee) the drawer thereof shall respectively be entitled to the same rights, and be placed in the same position in

all respects, as they would respectively have been entitled to and have been placed in if the amount of the cheque had been paid to and received by the true owner thereof.

By sect. 10, any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same shall be crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

By sect. 11, where a cheque is presented for payment which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, a banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorised by this Act, and of payment being made otherwise than to a banker, or the banker to whom the cheque is or was crossed, or to his agent for collection, being a banker (as the case may be).

By sect. 12, a person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," *shall* not have, and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

But a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself, shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment (*ww*).

The above Act was passed in consequence of the decision in *Smith* v. *Union Bank of London* (*x*).

The plaintiff drew a cheque on M. & Co., crossed L. & C. Bank. It was drawn to order, and the indorsement forged. The defendant became an innocent holder, and sent it to his bankers, who sent it to M. & Co., who cashed it not noticing it was crossed L. & C. Bank. The jury found the plaintiff, the payee, and M. & Co., guilty of negligence. It was held that the defendant had acquired no title, that M. & Co. had paid the money to the wrong bankers, and that the plaintiff might recover (*y*).

Lien of Bankers.—Bankers have a lien upon all the securities of their customers in their hands for advances in the ordinary

(*ww*) See *Matthiessen* v. *London & County Bank*, 5 C. P. D. 7, and sects. 81 & 82 in Bills of Exch. Act in App.

(*x*) *Smith* v. *Union Bank of London*, L. R. 1 Q. B. D. 31.

(*y*) *Bobbett* v. *Pinkett*, 1 Ex. D. 368.

course of business, unless such securities have been received under special arrangement inconsistent with the exercise of the right (z), or for some special purpose (a). But they have no lien on boxes and their contents deposited with them for convenience and safe custody merely (b).

Damages for non-payment of cheques by bankers.—If a banker refuses to pay a cheque drawn upon him by a trader who keeps an account with him, and who has sufficient assets in the hands of the banker to meet the cheque at the time it is presented for payment, such trader is entitled, as we have seen, to recover substantial damages without proof of any actual damage, since the dishonouring of cheques is likely to be very injurious to the credit of persons in trade (c).

Of a mandate or gratuitous commission.—If the bailee or depositary expressly or impliedly undertakes for something more than the mere passive custody of the thing bailed, the bailment advances from a mere naked deposit or simple bailment to a mandate, and the bailee becomes clothed with the duties and implied engagements of a mandatary, in addition to those of a mere depositary for keeping. If money is bailed to a man upon the faith of a promise made by him to take and deliver it to a banker, or to invest it in the public funds, or lay it out in the purchase of lands, this is an express mandate. An implied mandate arises when the bailee takes charge of living animals or perishable chattels, for whose preservation and safe keeping a certain amount of work and labour, attention and skill, is necessarily requisite, and which the bailee, by accepting the trust and duty, impliedly undertakes to furnish. It is essential to the existence of a mandate that it be gratuitous; for, if anything is to be paid for what is expressly or impliedly agreed to be done, the contract immediately becomes a contract of letting and hiring of labour and skill to be performed and exercised upon the thing bailed (d).

The term *mandatum* or mandate was applied in the Roman law to all gratuitous agencies and procurations, whether made concerning land or realty or chattels, and whether accompanied or unaccompanied by any transfer or delivery of property (e). In the common law, the term is generally restricted to express or implied promises made on bailments of chattels that something shall be

(z) *Jones* v. *Peppercorn*, 28 L. J. Ch. 158; *Meadows, in re*, 28 L. J. Ch. 891; *City Bank, ex parte*, 3 Law T. R. N. S. 792; *In re European Bank*, L. R. 8 Ch. 41.

(a) *Brandao* v. *Barnett*, 12 Cl. & Fin. 787; *Wylde* v. *Radford*, 33 L. J. Ch. 51; *London Chartered Bank of Australia* v. *White*, 4 Ap. Cas. 413.

(b) *Leese* v. *Martin*, L. R. 17 Eq. 224.

(c) *Rolin* v. *Steward*, 14 C. B. 595; 23 L. J. C. P. 148.

(d) *In summâ sciendum est, mandatum nisi gratuitum sit in aliam formam negotii cadere; nam, mercede constitutâ, incipit locatio et conductio esse.* Instit. lib. 3, tit. 27, s. 13.

(e) Instit. lib. 3, tit. 27.

done with them gratuitously for the benefit of the bailor. The bailor who makes the request and gives the directions as to the disposal of the chattel is called the mandator; and the bailee who receives the chattel upon the terms expressed or implied, and assents to the directions, and undertakes the trust to be performed, is called the mandatary. So long as there has been no actual bailment by the delivery and acceptance of the chattel, there is no binding contract of mandate. A promise to do something with a thing that has never been put into the actual or constructive possession of the promisor is a mere *nudum pactum* which may be revoked; but, when the bailment has been made upon the faith of the promise, and the promisor has obtained possession of the chattel in execution of the mandate, the contract is complete, and he is bound faithfully to discharge the trust he has undertaken.

Non-feazance and mis-feazance.—It has been said, in reference to gratuitous undertakings to perform work, that, if the promisor does not proceed on the work, no action will lie against him for the non-feazance; but, "if he proceeds on the employment, he makes himself liable for any misfeazance in the course of that work." But, when a man promises to perform work upon, or to do something with, the chattel of another, and the chattel is bailed to him for the purpose expressed, his acceptance of the possession of the chattel in execution of his engagement is an "entering on the work and employment;" and, if, after having accepted such possession and taken the chattel away with him, he neglects to do that which he promised to perform, this neglect is a misfeazance, for which he shall be responsible (*f*). "A bare being trusted," observes Holt, C.J., "with another man's goods must be taken to be a sufficient consideration, if the bailee once enter upon the trust and take the goods into his possession" (*g*). Where a sum of money was bailed to a party upon the faith of an undertaking made by him to cause the sum to be paid to the bailor or his order at a distant place, it was held that the bailment of the money was a sufficient consideration for the undertaking, and that the mandatary was responsible for the non-fulfilment of his engagement (*h*). So, where certain boilers were delivered to a man upon the faith of an undertaking made by him to weigh them gratuitously and return them to the bailor in as perfect and complete condition as they were in at the time of the making of the bailment, and the mandatary took the boilers to pieces in order to weigh them, but refused to put them together again, it was held that he was responsible for

(*f*) Holt, C. J., *Coggs* v. *Bernard*, 2 Raym. 919, 920; *Elsee* v. *Gatward*, 5 T. R. 149; *Balfe* v. *West*, 22 L. J. C. P. 175; 13 C. B. 466.

(*g*) *Coggs* v. *Bernard*, 2 Raym. 912.

(*h*) *Shillibeer* v. *Glynn*, 2 M. & W. 143

his breach of contract, and must make good the damage that had been sustained by the mandator. The mandatary may, indeed, revoke his promise and return the chattel, if he does it without delay, and before his acceptance of the trust and omission to fulfil it have occasioned loss or damage to the mandator; but he cannot, if the revocation will place the latter in a worse position than he was in at the time the mandate was accepted and the promise made, lawfully withdraw such promise, and refuse to execute the trust. "Every man is at liberty," it is observed in the Institutes, "to refuse a mandate; but, when once accepted and undertaken, it must be performed or renounced as soon as possible, that the mandator may transact the business himself or through another" (*i*). If, therefore, a party undertakes to procure an insurance for another, and proceeds to carry his undertaking into effect by getting a policy underwritten, but deals so negligently with the policy that the benefit of the insurance is totally lost to the party for whom he promised to effect it, he is liable to an action (*k*); but, if, after having made the promise, he simply neglects to get the insurance effected, it is said he is not liable for the default (*l*).

Bailment of money and chattels to be carried gratuitously—Loss or damage from negligence.—A bailee who has undertaken gratuitously to convey money or goods from one place to another, and has entered upon the trust by accepting possession of the money or the goods, is bound to exercise the same care and diligence in the execution of the task as a person of ordinary care and prudence might be expected to exercise in the conveyance of his own property. If by negligence and mismanagement in the accomplishment of his undertaking, the money or the goods are lost or stolen, injured or spoiled, he will be responsible for the loss. But he is not responsible for the loss of the money, if he is forcibly robbed without any default on his part.

Bailments of chattels to be mended or repaired gratuitously—Employment of unskilful persons.—If a chattel is bailed to a workman or artificer in some particular art, craft, or profession, upon the faith of an undertaking made by the bailee to mend, repair, or improve it gratuitously for the benefit of the mandator, the mandatary must complete the work within a reasonable period, and must be especially mindful that the article is not injured in his hands during the performance of the work through a want of that knowledge and skill which every workman and artificer in his particular art or craft is bound to possess (*post*, pp. 404—407). But, if a person, known to be unskilled in the particular work or

(*i*) Inst. lib. 3, tit. 27, s. 11.

(*k*) *Wallace* v. *Tellfair*, cited *Wilkinson* v. *Coverdale*, 1 Esp. 76.

(*l*) *Thorne* v. *Deas*, 4 Johns. U. S. 84.

employment he gratuitously undertakes, does the work at the solicitation of a friend with such ability as he possesses, he stands excused, although it is unskilfully done; for it is the mandator's own folly to trust him, and the party engages for no more than a reasonable exertion of his capacity. Thus, where a mandatary undertook to get some articles that had been bailed to him entered at the Custom House, and gave by mistake a wrong description, but appeared to have acted *bonâ fide* and to the best of his ability, it was held that he was not responsible for a seizure of the goods by the Custom-house officers. "Had the situation or profession of the bailee," observes Lord Loughborough, "been such as to imply skill, an omission of that skill would have been imputable to him as gross negligence. If, in this case, a shipbroker or a clerk in the Custom House had undertaken to enter the goods, a wrong entry would in him be gross negligence, because the situation and employment necessarily imply a competent degree of knowledge in making such entries" (*m*).

In respect of the custody and safe keeping of the chattel, the mandatary is clothed with the ordinary liabilities and responsibilities of a depositary

Bailment of money for investment—If money is bailed to a man upon the faith of a promise or assurance made by him to place it out at interest, or to purchase an annuity with it for the benefit of the bailor, the mandatary who accepts the money and enters upon the execution of the trust impliedly promises to be diligent and careful in the fulfilment of his undertaking, and to exercise common and ordinary care in the selection of a safe investment; and, if the money is lost by his miscarriage and neglect, an action will lie against him for the loss (*n*). But the mandatary is not responsible (if he does not exercise any trade or profession denoting that he has peculiar skill in money matters) for the exercise of more than ordinary care and caution; and he is not liable for the failure of the investment, if he has used such skill and knowledge as he possessed, and has acted with uprightness and honesty of purpose in the transaction of the business confided to him. "The only duty that is imposed upon him under such a retainer and employment is a duty to act faithfully and honestly, and not to be guilty of any gross or corrupt neglect in the discharge of that which he undertakes to do" (*o*). But an attorney, whose profession and employment naturally lead him to have some knowledge of securities for money and pecuniary in-

(*m*) *Shiells* v. *Blackburne*, 1 H. Bl. 159; *Moore* v. *Morgue*, 2 Cowp. 479.

(*n*) *Coggs* v. *Bernard*, 2 Raym. 910; *Whitehead* v. *Greetham*, 10 Moore, 194; 2 Bing 464.

(*o*) *Dartnall* v. *Howard*, 4 B. & C. 350, 3 .

vestments, is responsible for the exercise of a reasonable amount of professional knowledge and skill in the selection of a safe investment, although he acts gratuitously (*p*). His office, profession, and employment imply skill and invite confidence: and an omission of that skill is imputable to him as gross negligence (*q*). If a sum of money is entrusted to a man to be transmitted to some distant part, or to be laid out by him in some purchase or investment for the benefit of the mandator, and with an express or implied authority or permission to use the money himself until the purpose for which it was bailed can be accomplished, and the mandatary accordingly spends the money with the intention of re-placing it when necessary with other money, or pays it into his bankers to his own account, and not to the separate account of the mandator, the bailment of the money becomes a loan for use and consumption, and the bailee is clothed with the duties and liabilities and implied engagements of a borrower by way of *mutuum*, in addition to those of a mandatary (*ante*, p. 347). In these cases the money is payable, as we have seen, absolutely and at all events; and the bailee cannot excuse himself from the obligation to re-pay the amount by showing a loss by robbery or from inevitable accident.

Bailments of living animals—Negligent management.—If the subject-matter of the bailment consists of living animals, such as horses, oxen, cattle, or sheep, the mandatary is bound to furnish them with suitable food and nourishment, and to give them a proper and reasonable amount of exercise and fresh air. If a man takes charge of cattle or sheep, and afterwards takes no heed of them, but lets them stray away on a common, and get drowned or lost, this is a breach of trust, and he is responsible for the loss (*r*). If he turns a horse, of which he has consented gratuitously to take charge, into a dangerous pasture after dark, and the horse falls into a pit or well, or into the shaft of a mine, this is a gross neglect and breach of trust, and he shall be responsible for the loss (*s*). If he places a horse in a pasture surrounded by rotten and very defective fences, and the horse, by reason thereof, strays away and is lost, this is also a breach of trust, for which he shall be answerable; but, if the horse was a wild ungovernable animal, and got away through its own impatience of restraint as much as by reason of the defective fences, then the bailee will not be responsible for the loss (*t*).

(*p*) *Donaldson* v. *Haldane*, 7 Cl. & Fin. 762; *Bourne* v. *Diggles*, 2 Chitt. 311; *Craig* v. *Watson*, 8 Beav. 427; *Smith* v. *Pococke*, 23 L. J. Ch. 545; 18 Jur. 478.

(*q*) *Shiells* v. *Blackburne*, *ante*, p. 379.

(*r*) Hil. Term, 2 Hen. 7, 9 b.; *Coggs* v. *Bernard*, 2 Raym. 913.

(*s*) *Rooth* v. *Wilson*, 1 B. & Ald. 61, 62.

(*t*) Domat (DEPOT), s. 3, 6.

Where an agister (not a gratuitous bailee) placed the plaintiff's horse in a field where there were heifers, knowing that a bull was in the habit of getting into the field, though he did not know it was vicious, and the bull gored the horse; it was held that the *scienter* was immaterial, as he had contracted to take reasonable care and had not done so (*u*). What is, and what is not, gross negligence amounting to a breach of trust is often a mixed question of law and fact, but more generally a pure question of fact. It must be judged of by the actual state of society, the general usages of life, and the dangers peculiar to the times, as well as by the apparent nature and value of the subject-matter of the bailment, and the degree of care it seems to require (*x*). Where a man proved to be conversant with, and skilled in, horses was commissioned to ride a horse to a neighbouring village, for the purpose of showing it for sale, and on his arrival he rode the horse into the race-ground, which was wet and slippery, and the horse slipped and fell several times, and at last in falling broke one of its knees, it was held that the bailee had been guilty of a culpable neglect and breach of trust, and was answerable for the damage (*y*). If a farrier undertakes to treat a living animal for some disorder gratuitously, he is nevertheless bound to exercise the ordinary knowledge and skill of his art or profession in the course of his treatment, and will be responsible for injuries resulting from his neglect to do so (*z*).

Bailments of perishable commodities.—If the subject-matter of the bailment is a perishable commodity, the bailee is bound to bestow such an amount of labour and vigilance for its preservation as would ordinarily be bestowed by a prudent owner. If the mandatary of a valuable painting lets it lie on the damp ground, or places it in a kitchen, or against a damp wall in a room where there is no fire, when he might have placed it in a dry situation and in perfect security, this is an act of gross negligence (*a*).

Of the use of the subject-matter of the mandate.—A mandatary has no right to make use of the subject-matter of the bailment for his own gain and advantage; if he does so, and it is lost, or in any way injured or deteriorated in value by reason of the user, he must, in common with a depositary, make good the loss. The moderate exercise of a horse, or a hound, or a living animal, is necessary for its health and safe preservation, and is, consequently, a user for the benefit of the owner. A mandatary who has charge

(*u*) *Smith* v. *Cook*, L. R. 1 Q. B. D. 79; see *post*, p. 417.
(*x*) Story on Bailments, 9, 10.
(*y*) *Wilson* v. *Brett*, 11 M. & W. 113.
(*z*) *Shiells* v. *Blackburne*, 1 H. Bl. 162.
(*a*) *Mytton* v. *Cock*, 2 Str. 1099.

of a milch-cow or of sheep is bound to milk the cow and shear the sheep, and must account for the produce to the mandator; if he sells the milk or the wool, and refuses to pay over the money, this is a conversion of it to his own use, and a breach of trust, for which he shall be held responsible. If the bailment is made under circumstances leading to the conclusion that the bailee was to have the use of the thing in return for his labour and pains in the keeping of it, as if he were to have the milk of the cow, the wool of the sheep, or the young of animals bearing increase, for his own benefit and advantage, then the bailment would amount to a contract of borrowing and lending, and not to a mandate.

Theft and negligence by servants of the mandatary.—If the mandatary has given express directions to his servant to take into his custody money, or chattels, or securities, and do with them that which he himself has undertaken to perform, the negligence of the servant in carrying into execution the orders of the master is the negligence of the master, and the latter will be responsible accordingly; but, if the servant deals with the property of his own will, and without the warrant or authority of the master, the latter is not responsible, unless there be a default in him in knowingly employing a drunken, negligent, or dishonest servant.

Payment of expenses.—By the Roman law the mandator was bound to re-imburse the mandatary all expenses that he had necessarily and unavoidably incurred in the safe keeping and preservation of a chattel entrusted to his care and management; for it was considered that a gratuitous commission executed for the behoof of the mandator ought not to be made a subject of expense and charge to the mandatary (*b*). In the common law, if the mandatary must necessarily incur expense in the execution of the commission entrusted to him, he is clothed with an implied authority from the mandator to defray such expenses (*c*). The French law accords to the mandatary a right to detain the chattel until he has received payment of the expenses he has incurred in the execution of the trust concerning it. In our own law no such right exists; and no lien is permitted to be claimed by one man upon the property of another for the expenses attendant upon the execution of a gratuitous commission.

Taskwork.—A contract for the letting out and hiring of "work by the great," or, as it is more commonly called, job or taskwork, is a contract for the doing of work in the lump or the job, for a stipulated or implied remuneration, such as a contract to build a house, or dig a well, or make a canal,

(*b*) Dig. lib. 16, tit. 3, l. 12, s. 23; Domat. lib. 1, tit. 15, s. 2, s. 6.

(*c*) Story's Bailments, s. 197.

or to construct a ship or carriage out of materials furnished by the employer, or to sell goods for a commission on the sale. A contract of this description was styled by the civilians LOCATIO OPERIS FACIENDI, or the letting out of work to be done. The employer was called LOCATOR OPERIS, or the letter-out of the work; and the workman who undertook the task, and bestowed his labour and skill in its completion, for a reward to be paid to him, was called CONDUCTOR OPERIS, or the hirer of the work. The terms letter and hirer, however, are applicable, in different senses, to each of the contracting parties. Thus the *locator operis*, or letter-out of the work, is also *conductor operarum*, or hirer of the labour and services; and the *conductor operis*, or hirer of the work, is also *locator operarum*, or the letter-out of the labour and services (*d*). When chattels are delivered to a warehouseman or storekeeper to be taken care of or kept for hire, the contract is a contract for the letting and hiring of care and custody, termed LOCATIO OPERIS ET CUSTODIÆ.

Of the distinction between contracts for work and services and contracts of sale.—There is a great analogy between contracts for working up materials and the contract of sale; for, if the materials for the work, as well as the work itself, have been furnished by the workman, then the contract is in general a contract of sale; while, on the other hand, if the employer has furnished the materials, and the undertaker of the work contributes his labour merely, the contract is a contract of letting and hiring of labour (*post*, Contracts for Sale). If the groundwork of the labour or the principal material entering into its composition has been provided by the employer, the contract is a contract for the letting and hiring of work, although the undertaker of the work may have furnished the accessorial materials necessary for its completion. If a man, for instance, sends his own cloth to a tailor to be made into a coat, and the tailor furnishes the buttons, the thread, and the trimmings, the contract is nevertheless a letting and hiring of work, and not a contract of buying and selling (*e*). In the case of works of art the work and skill of the workman constitute, in general, the essence of the contract, the materials being merely accessorial; and, whenever the skill and labour are of the highest description, and the materials of small comparative value, the contract is a contract for work, labour, and

(*d*) *Sed dicendum est in hâc specie locationis diverso respectu eundem et locatorem et conductorem videri. Nam qui operam locare dicitur, ille idem dicitur conducere opus faciendum et ex contrario qui operam dicitur conducere, idem dicitur locare aliquid faciendum; ut conductor operis idem sit operæ locator, et locator operis idem operæ conductor.* Vin. Com. lib 3, tit 25, p. 758, Poth Louage, No. 392.

(*e*) Pothier, Louage d'ouvrage, No. 394.

materials, and not a contract of sale (*f*). A contract, for example, for the printing of a book is a contract for the letting and hiring of work and services, although the printer supplies both the paper and the ink, and not a contract of sale (*g*). But a contract by a dentist to make a set of artificial teeth, to fit the mouth of the employer, is a contract for the sale of a chattel and not a contract for work and labour (*h*). When a contract has been entered into for the building of a house on the land of the employer, and the builder furnishes the timber, stone, and materials for the construction of the building, the contract is not a contract of sale, although it appears as if the builder sold the materials, but a contract of letting and hiring, because the land which is the principal material for the labour, and to which the building is merely an accessory, has been provided by the employer (*i*). If, indeed, the builder is, by the contract, to provide the ground as well as the accessorial materials for the house, then the contract is a contract of purchase and sale.

Executory and executed contracts for work.—Contracts for work and services, like all other contracts of letting and hiring, are perfected by the bare consent of the parties, so that, as soon as the mutual promises are exchanged, the right to the benefit of the work passes to the workman or hirer of the job, and the right to the labour to the employer or letter of the work (*k*). If a mutual misunderstanding has arisen without any fault or want of good faith on either side, as if the workman has mistaken the meaning of the employer, and made one thing when another was ordered, the contract is void, as no valid and effectual consent to bind the parties has ever been given. If there is no mutual engagement between the parties for the one to do the work, and the other to provide it and pay for its execution, there is, as we have before seen, no binding contract at all, unless the engagement is under seal (*ante*, pp. 12, 13). The workman in such a case is not bound to enter upon his task; nor is the other party bound to provide the work and pay the hire. But, when the work has been actually done, the person at whose request and by whose orders it was executed must pay for it, although the workman was originally under no legal obligation to do the work, nor the employer to employ him. The law generally implies a promise from the employer to pay a reasonable compensation for services rendered, unless it appears that the services were to be gratuitous, or that

(*f*) See, however, the remarks of Crompton, J., and Blackburn, J., in *Lee* v. *Griffin*, 1 B. & S. 278.

(*g*) *Clay* v. *Yates*, 1 H. & N. 73; 25 L. J. Ex. 237.

(*h*) *Lee* v. *Griffin*, *supra*.

(*i*) Dig. lib. 19, tit. 2, lex 22, s. 2.

(*k*) *Lara* v. *Gen. Apoth. Co.*, 26 L. J. Ex. 225; *ante*, p. 5.

the workman relied for payment upon a particular fund, and not upon the personal responsibility of the employer (l). When a person has, by fraud, induced another to perform a service for him, intending not to pay for the performance of it, still there is a liability implied by the law, which may be enforced in the same way as an obligation arising out of an express contract (m).

Work and services in preserving a lost chattel, and restoring it to the owner.—Doubts have at different times been expressed as to whether a person who has voluntarily bestowed his own labour and services, and incurred expense, in the recovery and restoration of a lost chattel to the owner, is entitled to an action to recover compensation and remuneration therefor (n). In the case of the recovery and restoration of shipwrecked property he is clearly entitled to such a compensation; and there seems to be no valid reason for confining this right of reward to cases of salvage from shipwreck.

"In the French law," observes Domat, "he who receives back a thing which he had lost is obliged, on his part, to reimburse the finder the expenses incurred by him in the preservation and restoration of the thing lost, such as the expense of feeding a strayed beast which required nourishment, or the carriage and conveyance of the thing lost to some place of safety, or the expense of advertisements, or the publication of printed notices in order to give information to the owner" (o). If the owner is present and cognizant of the exertions made to recover his lost property, it will be a question of fact whether there was, or was not, an implied request on his part for the performance of the service actually rendered, and a tacit understanding between the parties that the person doing the work should be rewarded for his pains.

Salvage services—In order to encourage persons to lend their aid and assistance for the protection and preservation of property and life from shipwreck, the law gives to the parties by whose labour and assistance the property or lives have been saved from impending peril, a claim to a fair and reasonable compensation for their services, and a right to retain the property until they have received it (p). This compensation is called salvage, a term derived from the French word *salver*, or *sauver*, to save. The amount of salvage payable in the case of the recovery of property lost by

(l) *Ante*, p. 21; *Poucher* v. *Norman*, 3 B. & C. 744; Parke, B., *Higgins* v *Hopkins*, 3 Exch. 166; *Hingeston* v *Kelly*, 18 L. J. Ex. 360; *Alexander* v *Worman*, 6 H. & N. 100; 30 L. J. Ex 198

(m) *Rumsey* v. *N. E. Ry. Co*, 14 C B. N. S. 641; 32 L J. C. P. 244.

(n) *Lampleigh* v. *Braithwaite*, 1 Smith's L C 5th ed., 135.

(o) Domat, liv. 2, tit. 9, s. 2, No. 2; Dig lib. 47, tit 2, lex 43, s 8.

(p) *Hartford* v *Jones*, 1 Raym. 393; Salk 654, pl. 2; 17 & 18 Vict. c. 104, ss 458–470, 24 Vict. c. 10, s 9; 25 & 26 Vict c. 63, s 59, *The Fusilier*, 2 Moo P. C. N. S. 51; 34 L. J. Adm. 25; *The Phantom*, L. R. 1 Adm. 58.

shipwreck or abandoned at sea (*q*) depends upon the value of the thing saved, the degree of danger of loss, and the amount of labour and skill employed in saving it. Some maritime codes have proportioned the amount to the value of the thing saved, without reference to the surrounding circumstances of the case; but this is obviously unjust; and our own law, therefore, merely directs as a general principle that a fair and reasonable compensation shall be made (*r*). If the salvors are guilty of misconduct, and occasion injury to the ship and cargo by rescuing the vessel from one danger only to run her into another, the claim for salvage will be lost (*s*). But, if success is finally obtained, no mere mistake or error of judgment in the manner of procuring it, and no misconduct short of that which is wilful and may be considered criminal on the part of the salvors, will work an entire forfeiture of the salvage. Mistake or misconduct, not wilful but diminishing the value of the property salved or occasioning expense to the owners, will, however, be considered in estimating the amount of compensation to be awarded (*t*). There can be no claim to salvage where the efforts to salve have not been attended with success (*u*). A man cannot entitle himself to salvage in respect of services which have been rendered contrary to the express wishes and directions of the owner, and has no right to interfere with persons employed by the owner to save the property (*x*). And, if one set of men have taken possession of a vessel abandoned at sea and are endeavouring to preserve it, another set have no right to molest them and become participators in the salvage, unless it appears that the first would not have been able to effect the purpose without the aid of the others (*y*). A passenger is not entitled to claim salvage in respect of that ordinary assistance to a vessel in distress which it is the interest of all persons on board to give, for the purpose of avoiding the common danger (*z*). But, for extraordinary services rendered and dangers incurred for the preservation of the vessel, the passenger is as much entitled to salvage as a mere stranger (*a*). And salvage service may be performed even by the seamen of the ship salved, when an abandonment of her has put an end to their original contract (*b*). So also salvage services may be rendered by a pilot where they have put off to sea to help a vessel, the test not

(*q*) *The Genessee*, 12 Jur. 401.

(*r*) *The Otto Hermann*, 33 L. J. Adm. 189: *The Thomas Fielden*, 32 L. J. Adm. 61.

(*s*) *The Dosseitei*, 10 Jur. 865.

(*t*) *The Atlas*, 15 Moo. P. C. 329.

(*u*) *The Edward Hawkins*, 31 L. J. Adm. 46; *The Atlas*, 31 L. J. Adm. 210; but if men are engaged by a ship in distress it is otherwise, see *The Undaunted*, Lush. 90.

(*x*) *Sutton* v. *Buck*, 2 Taunt. 312.

(*y*) Abbott, 495.

(*z*) *The Branston*, 2 Hag. 3; *The Vrede*, 1 Lush. 322; 30 L. J. Adm. 209.

(*a*) *Newman* v. *Walters*, 3 B. & P. 612.

(*b*) *The Vrede*, 30 L. J. Adm. 209; *The Le Jouet*, L. R. 3 A. & E. 556; 41 L. J. Adm. 95.

being whether the vessel was at the time of succour in distress or damaged, but whether the pilot could be expected to incur the risk for only pilotage reward (c). Where both ships belong to the same owner, the master and crew of the ship which has performed the services are entitled to salvage, provided the services performed are not within the contract which they originally entered into with the owners (d). And the owners of a salving vessel are entitled to remuneration, although some of them are also owners of the vessel which did the mischief (e). An agreement for salvage which is reasonable at the time it is made is valid, notwithstanding circumstances may render the services more expensive or hazardous than was anticipated (ee). By the 17 & 18 Vict. c. 104, s. 182, every stipulation by which any seaman consents to abandon any right which he may have or obtain in the nature of salvage, is wholly inoperative (f); but by the 25 & 26 Vict. c. 63, s. 18, this is not to apply to the case of any agreement made by the seamen belonging to any ship which by the terms of the agreement is to be employed on salvage service. Compulsion or fraud will avoid a contract as to salvage (ff). Persons who merely furnish boats, tackle, or other articles of use for salvage purposes, are not entitled to be paid as salvors, but for the use of the articles they have supplied (g). There is no distinction between river salvage and sea salvage, the danger and meritorious nature of the services in either case being the ground on which the compensation is awarded (h).

Services by trustees.—The law raises no implied promise of remuneration in respect of services of a fiduciary character (i). If, therefore, a solicitor consents to act as a trustee of property, and renders professional services in matters relating to the trust estate confided to him, he is not entitled to charge for such services whether he acts for himself alone, being sole trustee, or for himself and others who are his co-trustees, unless there is a provision in the deed or will creating the trust enabling him to receive remuneration for the transaction of such business; but he is entitled to charge the trust estate with costs out of pocket (k). A trustee, moreover, is not allowed to make the execution of the trust a source of profit

(c) *Akerbloom* v. *Price*, 7 Q. B. D. 129; see *The Anders Knape*, L. R. 4 P. D. 213.

(d) *The Sappho*, L. R. 3 P. C. 690; 40 L. J. P. C. 48; *The Scout*, L. R. 3 A. & E. 512; 41 L. J. Adm. 42.

(e) *The Glengaber*, L. R. 3 A. & E. 534; 41 L. J. Adm. 84.

(ee) *The Waverley*, 40 L. J. Adm. 42.

(f) *The Rosario*, L. R. 2 P. D. 41; seamen may, however, arrange for an apportionment, see *The Afrika*, L. R. 5 P. D. 192.

(ff) *The Medina*, L. R. 2 P. D. 5, C. A.

(g) *The Charlotte*, 12 Jur. 568.

(h) *The Carrier Dove*, 2 Moo. P. C. N. S. 243, and see *Nicholson* v. *Chapman*, 2 H. Bl. 258.

(i) *Barrett* v. *Hartley*, L. R. 2 Eq. 789.

(k) *Moore* v. *Froud*, 3 Myl. & Cr. 45; *Christophers* v. *White*, 10 Beav. 523; *Manson* v. *Baillie*, 2 Macq. H. L. C. 80, overruling *Cradock* v. *Piper*, 1 Mac. & Gord. 664.

to himself, and cannot sue upon an express contract between him and his co-trustees for payment for his services to the trust; for each trustee is to be a check and control upon each and all the co-trustees; and one of them cannot authorise another to make professional charges to be paid out of the trust fund. Where, therefore, a number of trustees appointed one of their own body, who was a lawyer, "factor to the trust," with an allowance for his necessary charges and expenses and a "reasonable gratification," and the factor sued his co-trustees for his professional charges "by reason of their having employed him as their commissioner, factor, cashier, and attorney in the aforesaid trust," it was held that he was not entitled to recover these charges either from them or from the trust estate (*l*). Where one of several solicitors in partnership has taken upon himself the office of trustee, the firm of which he is a member cannot charge for professional services rendered by them in the execution of the trust (*m*).

In a recent case where it was proved that the partner of a trustee had, as solicitor to the trust, transacted the whole trust business entirely on his own account and for his own exclusive benefit, under an arrangement which had been made between him and his partner, that they should not be partners in any matters relating to the trust property, but that the partner who was not a trustee should, in all matters relating to the trust, act as sole solicitor to the trust, and be entitled to receive, for his own exclusive benefit, all costs and charges which might be incurred in the execution of the trust, the professional charges of the partner were allowed to be paid out of the trust estate (*n*).

Promises of presents in return for services.—If services have been rendered and benefits conferred on the express understanding that the person rendering the services is to trust entirely to the generosity of the party benefited, and not to look for payment as a right, there is no contract (*o*). But, if a person promises to make a present in return for services rendered, there is evidence of a contract to pay a reasonable sum (*p*).

Honorary and gratuitous services.—If the employment is by custom and usage of a purely honorary and gratuitous character, the *primâ facie* presumption of a letting and hiring of the services is rebutted as soon as the custom is proved and established. The

(*l*) *Manson* v. *Baillie*, 2 Macq. H. L. C. 80, questioning *Cradock* v. *Piper*, *supra*; *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. H. L. C. 461; *post*, p. 825.

(*m*) *Collins* v. *Carey*, 2 Beav. 128; *Broughton* v. *Broughton*, 5 De G. M. & G. 160.

(*n*) *Clack* v. *Carlon*, 30 L. J. Ch. 639.

(*o*) *Roberts* v. *Smith*, 4 H. & N. 321; 28 L. J. Ex. 164; *Taylor* v. *Brewer*, 1 M. & S. 290.

(*p*) *Jewry* v. *Busk*, 5 Taunt. 302; *Bryant* v. *Flight*, 5 M. & W. 114; *Bird* v. *M'Gahey*, 2 C. & K. 708.

office of an arbitrator is deemed to be an honorary office; and a person who acts as such cannot charge for his services, unless it appears from the terms of the submission or the surrounding circumstances of the transaction that it was the intention of the parties that the arbitrator should be paid for his time and trouble, or unless there is an express promise to pay him for his services (*q*). Barristers likewise exercise an office and profession of an honorary character. They are presumed in law not to afford their professional services with any mercenary view, and cannot, therefore, maintain an action for remuneration for advice or advocacy in matter of litigation, or for services ancillary to the service of an advocate, although there be an express contract to pay them a stipulated sum for such service (*r*); but in cases unconnected with advocacy, and for services not of a professional character, a barrister may, it seems, contract for remuneration. A physician may sue for his services, if he is registered as a physician under the Medical Act, and is not prohibited by the college to which he belongs from bringing an action for his charges (*s*). If the service appears to have been rendered as a gratuitous act of kindness, or in discharge of a public duty, the *primâ facie* presumption of a contract of letting and hiring is repelled. Thus, if a man undertakes a journey to become bail for his friend (*t*), or attends as a witness in a court of justice, he is not entitled to be paid for his trouble. In the last case, as the attendance to give evidence is a duty of a public nature, an express promise to remunerate the witness for so doing is invalid; but the witness is entitled to compensation according to the scale framed by the judges under the Common Law Procedure Acts (*u*).

The law raises no implied promise of remuneration in respect of the services of public officers. If by statute or immemorial usage a public officer is entitled to fees for his services he may maintain an action to recover them; but, where a duty is imposed by statute upon a public officer, and no provision is made for the payment of any remuneration, no action can be maintained for the recovery of any remuneration (*x*).

Rights and liabilities of employer and workman.—A person who employs another by the piece or by the job, or who lets out

(*q*) *Virany* v. *Warne*, 4 Esp. 47; *Hoggins* v. *Gordon*, 3 Q. B. 471.

(*r*) *Kennedy* v. *Brown*, 13 C. B. N. S. 677; 32 L. J. C. P. 137; *Brown* v. *Kennedy*, 33 L. J. Ch. 71, 342; 33 Beav. 133; *Hobart* v. *Butler*, 9 Ir. C. L. R. 157; *Morris* v. *Hunt*, 1 Chitt. 551; *Veitch* v. *Russell*, 3 Q. B. 928; *Egan* v. *Guard. Kens. Un.*, *ib.* 935, n.; *Atty.-Gen* v. *The Royal College of Physicians*, 1 Johns. & H. 561, 591; 30 L. J. Ch. 757; *Mostyn* v. *Mostyn*, L. R. 5 Ch. 457; 39 L. J. Ch. 780.

(*s*) 21 & 22 Vict. c. 90, s. 31; *Gibbon* v. *Budd*, 2 H. & C. 92; 32 L. J. Ex. 182.

(*t*) *Reason* v. *Wirdnam*, 1 C. & P. 434.

(*u*) *Nokes* v. *Gibbon*, 26 L. J. Ch. 208.

(*x*) *Jones* v. *Caermarthen (Mayor)*, 8 M. & W. 305.

task-work to be done for an express or implied remuneration, is, in general, bound to do everything that is necessary to be done on his part to enable the hirer of the work to execute his engagement, and earn the hire or reward. He impliedly undertakes to resort to no misrepresentation or concealment calculated to mislead the servant or undertaker of the work and give him a false estimate of the nature and extent of it, to accept the work when completed, and to pay the customary hire, in case no specific rate of remuneration has been agreed upon. When there is an absolute and unqualified refusal on the part of the employer to permit the workman to perform his task, or the employer does an act absolutely incapacitating himself from performing his part of the engagement, the undertaker of the work has a right, if he has done anything under the contract, to sue immediately, for remuneration on a *quantum meruit* if the contract is defeasible, or, if not, for compensation for the damage he has sustained in being prevented from earning the stipulated hire (*y*).

Defeasible contracts for work and services.—If a labourer is employed to dig potatoes at so much an acre, or to cut turf at so much a load, or to make excavations of earthwork at so much per cubic foot, the employer may, if there is no determinate term or employment, dispense, at any time, with the future services of the workman, paying him for the work actually done. If a party employs a factor or agent to collect his rents, or transact his business for him, for certain commission or reward, the employment is determinable at the will of the employer, unless it is coupled with an interest and the party employed is something more than an agent in the transaction. If an agent is employed to sell property on commission, it is competent to the employer, at any time before a sale has been actually effected, to revoke the authority, and deprive the agent of the expected commission (*z*); but, if expenses have been incurred by the agent in executing the authority intrusted to him, he will be entitled to recover such expenses from the employer, and also a reasonable compensation for any labour or trouble he may have undertaken in endeavouring to execute his commission, unless it appears to have been the understanding of the parties that nothing was to be paid unless the act authorized to be done was fully accomplished (*a*). If a commission agent employed to sell property has found a purchaser and effected the authorized contract of sale, he will be entitled to his commission, although

(*y*) *Planché* v. *Colburn*, 1 M. & Sc. 51; *Emmens* v. *Elderton*, *post*. p. 434; *Prickett* v. *Badger*, 1 C. B. N. S. 304; *Inchbald* v. *Western Neilgherry Coffee Co.*, 17 C. B. N. S. 733; 34 L. J. C. P. 15.

(*z*) *Simpson* v. *Lamb*, 17 C. B. 603; 25 L. J. C. P. 113.

(*a*) *Moffatt* v. *Laurie*, 15 C. B. 583; *De Bernardy* v. *Harding*, 8 Exch. 822; *Campanari* v. *Woodburn*, 15 C. B. 400; 24 L. J. C. P. 13.

the employer may refuse to fulfil the contract; and if he has found a party willing to buy, and the employer is then unable or unwilling to sell, the agent will be entitled to remuneration for his services (*b*).

Time of performance.—By the Judicature Act, 1873, s. 25 (7), stipulations in contracts as to time or otherwise which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in equity. Time is frequently of the essence of the contract as regards the commencement of the work, but not so with regard to its completion. If it is made a positive term of the contract that the work shall be commenced on a day named, the employer may refuse the services of the workman, and decline to employ him, if he does not tender his services or commence the work at the appointed period; but, when the work has been commenced, the completion of it by a day named will not in general be a condition precedent to the workman's right to the stipulated hire. When the materials for the work, for example, have been furnished by the employer, and the produce of the labour becomes, consequently, the property of the latter as the work proceeds, the non-performance of the work by an appointed time does not release the employer from his obligation to pay the contract price. He must in such a case perform his part of the engagement, and bring a cross action against the undertaker of the work to recover compensation for any damage he may have sustained by reason of the non-completion of the work at the appointed period (*c*). If after the time of completion the employer urges the continuance of the work, or encourages the workman to proceed, he waives the condition as to time (*d*).

Entire performance of a contract for work is often a condition precedent to payment.—Thus, if a coachman agrees to convey a passenger from London to York for a certain stipulated remuneration, and carries him only half the distance, he is not entitled to any payment, the precedent act to be performed being entire and indivisible. Where the plaintiff undertook to make "complete" certain dilapidated chandeliers for the sum of 10*l.*, and returned them in an incomplete state, it was held that he could not maintain an action for the work actually done (*e*). And, where an attorney covenanted to pay his clerk 2*s.* for every quire of paper he copied out, it was held that this was an entire covenant, of which no apportionment could be made *pro ratâ*, and that the clerk, conse-

(*b*) *Prickett* v. *Badger*, 1 C. B. N. S. 296.

(*c*) *Lucas* v. *Godwin*, 4 Sc. 509.

(*d*) *Burn* v *Miller*, 4 Taunt. 748.

(*e*) *Sinclair* v. *Bowles*, 4 M. & R. 3; 9 B. & C. 94.

quently, could not maintain an action to recover remuneration for copying out any number of sheets less than a quire (*f*). So, where the plaintiff offered to cure a flock of sheep and lambs of a disease called the scab, at so much per head for the sheep, and so much for the lambs, and stated that he did not expect to be paid unless he cured *all* the sheep and lambs; whereupon the defendant accepted his offer, and agreed to employ him; and the plaintiff, after he had materially checked the complaint, but before he had cured the whole of the flock, brought his action for the money; it was held that he was not entitled to recover anything for his pains (*g*).

Divisible and apportionable work.—But, if the work is in its nature divisible and apportionable, and there is nothing in the terms of the contract which, either by express stipulation or necessary intendment, precludes the plaintiff from recovering in respect of a partial execution of it, the plaintiff may, on performing a part only of his engagement, require a corresponding part performance on the part of the defendant (*h*). Thus, where a ship, being damaged at sea, put into a harbour to receive some repairs, and an agreement was made with a shipwright to put her "into thorough repair," but nothing was said as to the amount, or time, or mode of payment, and before the repairs were completed, the shipwright demanded payment for what he had done, it was held that the contract was not an entire contract to do the whole of the repairs and make no demand for payment until they were completed, but that the shipwright might from time to time, in the course of the work, demand payment for what he had done, before proceeding to complete the residue (*i*). And if, in a contract of this description, the defendant is deprived, by accident, of the benefit of the work before it is finished, the workman is not, by reason of such accident, deprived of his right to remuneration (*l*).

Building contracts.—If a contract has been entered into to build a house for a specific sum, to be paid on the completion of the building, the contract is entire and indivisible, and the employer is not bound to pay for a half or a quarter of a house; for the court and jury can have no right to apportion that which the parties themselves have treated as entire. But, where a builder engages to build a house, to be paid for his work and labour and the materials supplied by measure and value, or according to the customary rate of remuneration, he is entitled to demand payment from time to

(*f*) *Needler* v. *Guest*, Aleyn 9.
(*g*) *Bates* v. *Hudson*, 6 D. & R. 3.
(*h*) *Taylor* v. *Laird*, 1 H. & N. 266; 25 L. J. Ex. 329; *Button* v. *Thompson*, L. R. 4 C. P. 330.
(*i*) *Roberts* v. *Havelock*, 3 B. & Ad. 404.
(*l*) *Menetone* v. *Athawes*, 3 Burr. 1592.

time as the work proceeds. Every builder who contracts for the building of a house impliedly undertakes to furnish everything reasonably necessary for its completion (*m*) Where an action was brought by a builder against his employer upon a special contract for the building of a house for a certain sum, and the builder had omitted to put into the building certain joists according to his contract, it was contended that, as the employer had got the benefit of the house, he was bound to pay what it was fairly worth; but, per Mansfield, C J, "The defendant made no such agreement. He says, 'I agreed to pay you, if you would build my house in a certain manner, which you have not done' The plaintiff cannot now be permitted to turn round and say, 'I will be paid by a measure and value price instead of the contract price'" (*n*) If an architect, employed to prepare plans and specifications for a house, and to procure a builder to erect it, takes out the quantities, and represents to a builder that they are correct, and the builder thereupon makes a tender which is accepted, the builder cannot upon these facts alone recover more than the contract price from the employer, although it turns out that the quantities are wrong, and the builder has expended upon the building a much larger amount of material than he contemplated (*o*)

Work to be approved of before payment —If a tailor undertakes to make me a coat, or a coachbuilder to build me a carriage, upon the terms that I am not to take and pay for it, if, on inspection, I disapprove of the style and workmanship, I am at liberty to return the coat or the carriage, and refuse payment of the price, if I think fit so to do But if I engage an artist to work up my own materials, or to paint a ceiling in my house, and I have, consequently, no opportunity or power of returning him the produce of his labour, I cannot make my approval of the work a condition precedent to his right to demand some remuneration for what he has done (*p*). If a contract for the building or repairing of a house provides for the inspection and approval of the work by the employer before payment of the contract price, the employer must be afforded an opportunity of inspection before he can be called upon to pay; but he cannot, by withholding his approval unreasonably and *malâ fide*, after an opportunity of inspection has been afforded him, deprive the workman of his hire (*q*) The employer has, indeed, a right in all cases to inspect the work before he pays

(*m*) *Williams* v *Fitzmaurice*, 3 H & N. 844

(*n*) *Ellis* v *Hamlen*, 3 Taunt 52

(*o*) *Scrivener* v *Pask*, L R 1 C P 715

(*p*) *Andrews* v *Belfield*, 2 C B N S 779

(*q*) *Dallman* v *King*, 5 Sc 382, "*Ces termes, si je suis content de l'ouvrage, ne doivent pas être entendus en ce sens, que le locateur puisse être admis indistinctement, à dire qu'il n'est pas content de l'ouvrage, pour se dispenser de payer la gratification promise, ce qui rendrait cette clause nulle et illusoire*" Poth Louage, No 417.

for it; but his approval of a builder's work is by no means essential to the maintenance of an action by the builder. It will always be a question for the jury to determine, whether the employer has acted *bonâ fide*, and ought reasonably to have been satisfied with the work done (r). But, where the workman works up his own materials in the manufacture of a chattel, the employer may reserve to himself a right to rescind the contract and reject the chattel, if he finds, on trial or inspection, that it does not suit him, either on the score of workmanship, or of convenience, or taste (s). If his acceptance of an engine, or machine, and payment of the contract price, are made dependent upon his approval of the strength and soundness of the workmanship, and he rejects the machine because it does not work well, or does not answer his purpose, and not because it is deficient either in strength or soundness, he will be held responsible for the price (t).

When the right to receive payment is made dependent upon the approval of an architect or surveyor, or the production of a certificate that the work has been done according to contract, no right can arise which can be enforced until the approval has been given or the certificate has been obtained (u). Work, therefore, which has been done, but not to the satisfaction of the surveyor or architect, cannot be charged for (v); but, if the certificate is fraudulently or corruptly withheld, the court will give relief; and an action may in certain cases, be maintained for the malicious, corrupt, or fraudulent withholding of the certificate both against the architect and against the employer (w). If the certificate is not, by the express terms of the contract, required to be in writing, the architect's approbation testified by word of mouth is sufficient (x).

Relief against biassed or corrupt decisions of architects and surveyors.—If an architect's certificate is wrongfully or fraudulently withheld, the court will give relief, not only against the parties who are bound to pay, but also against the architect, surveyor, or engineer; and any stipulation in the contract, placing the latter in the position of an arbitrator between the employer and the workman, and making his decision final, and purporting to exclude the jurisdiction of any court with reference to his conduct, will be nugatory and of no effect (y). If questions arising between the

(r) *Parsons* v. *Sexton*, 4 C. B. 899; 16 L. J. C. P. 184; *Hughes* v. *Lenny*, 5 M. & W. 193.

(s) *Andrews* v. *Belfield*, 2 C. B. N. S. 779.

(t) *Ripley* v. *Lordan*, 6 Jur. N. S. 1078.

(u) *Scott* v. *Liverpool Corp.*, 25 L. J. Ch. 230; *Morgan* v. *Birnie*, 3 M. & Sc. 76; 9 Bing. 672; *Mayor, &c., of Salford* v. *Ackers*, 16 L. J. Ex. 6; *Moffatt* v. *Dickson*, 22 *ib.* C. P. 268; 13 C. B. 543.

(v) *Dobson* v. *Hudson*, 1 C. B. N. S. 659; 26 L. J. C. P. 153.

(w) *Milner* v. *Field*, 5 Exch. 829; 20 L. J. Ex. 68; *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L. J. Ex. 177; *Stadhard* v. *Lee*, 3 B. & S. 364; 32 L. J. Q. B. 75.

(x) *Roberts* v. *Watkins*, 32 L. J. C. P. 291; 14 C. B. N. S. 592.

(y) *Scott* v. *Liv. Corp.*, 25 L. J. Ch. 227.

contractor for works and the employer are, by the contract, left to the determination of the architect, and the latter has a personal interest unknown to the contractor and adverse to him (*z*), or does not act fairly between the parties, or manifests any undue leaning, bias, partiality, or corruption, the Court will review his decision and interfere to give relief, however strenuously the parties may by their contract have endeavoured to exclude the jurisdiction of the court (*a*).

Actions for wrongfully withholding the certificate may be maintained both against the architect and the employer, if it can be proved that the builder has fulfilled his contract and done all things necessary to be done by him to entitle him to the certificate, and that the architect had full knowledge thereof, and nevertheless neglected to certify in collusion with and by the procurement of the employer (*b*). But the employer is not responsible for any misconduct of his architect or surveyor in refusing to certify not brought about by his instrumentality or interference (*c*).

Effect of the employer's taking possession and making use of the unfinished work.—A landowner who by a building-contract provides a site for the erection of a house, and delivers the ground to the builder, does not thereby part with the possession of his land. The builder has the mere temporary custody of it, and may be turned off at any time by the employer (*d*). Where by a building contract it was stipulated that certain houses should be built on the land of the employer for a certain sum by a specified day to the satisfaction of a surveyor, upon whose approval payment was to be made, and the builder became bankrupt and was unable to complete the houses, and the employer then took possession of them and finished them, it was held that his taking possession of the unfinished houses did not amount to a waiver of the contract or of any of the terms or conditions thereof, and afforded no evidence that he accepted the benefit of the work actually done under an implied contract to pay for it according to measure and value (*e*).

Defective work accepted by the employer.—Whenever the employer has accepted and retains the benefit of work done for him under a special contract, which has been abandoned or rescinded,

(*z*) *Kimberley* v. *Dick*, L. R. 13 Eq. 1; 41 L. J. Ch. 38.

(*a*) *Kemp* v. *Rose*, 1 Giff. 258; *Scott* v. *Liv. Corp.*, *supra*; *Ormes* v. *Beadel*, 2 Giff. 166; 30 L. J. Ch. 1; *Pawley* v. *Turnbull*, 3 Giff. 70; *Bliss* v. *Smith*, 34 Beav. 508.

(*b*) *Batterbury* v. *Vyse*, 2 H. & C. 42; 32 L. J. Ex. 177; *Milner* v. *Field*, 5 Exch. 829; 20 L. J. Ex. 68; *Scott* v. *Liv. Corp.*, 25 L. J. Ch. 230.

(*c*) *Clarke* v. *Watson*, 18 C. B. N. S. 278; 34 L. J. C. P. 148.

(*d*) *The Marquis Camden* v. *Batterbury*, 5 C. B. N. S. 808; 7 C. B. N. S. 878; 28 L. J. C. P. 335.

(*e*) *Munro* v. *Butt*, 8 Ell. & Bl. 738; *Ranger* v. *Gt. West. Ry. Co.*, 5 H. L. C. 118.

and remains no longer a subsisting contract, he is liable to pay a reasonable remuneration in respect thereof. If the workman undertakes to repair a chattel, the property of the employer, and the new work and materials are so intermixed with the old work, that the one cannot be separated from the other without injury to the chattel, so that the employer must of necessity accept the work, his liability to pay for it, in case it has been negligently and unskilfully executed, depends upon the utility or inutility of the work. If the chattel has been benefited and rendered more valuable by what has been done, the employer must pay the fair value of the workmanship; if it is in nowise improved, and the work done has been so negligently executed as to be worth nothing, the employer cannot be called upon for payment. If the contract is an entire and indivisible contract for the completion of certain work, such as the contract to "make complete" the dilapidated chandeliers for the sum of 10*l.* previously mentioned (*ante*, p. 391), and the chattel is returned in an unfinished state, the employer may require the undertaker of the work to complete and perfect the article, and refuse payment of the money until it is done. The retention by the employer of his own unfinished chattel does not, in such a case, raise any inference of a waiver of any of the terms or conditions of the special contract, or of the entering into a new contract to pay upon a *quantum meruit* (*f*).

Substantial performance of building contracts.—When a contract has been entered into for the building of a house for a certain sum of money to be paid on the completion of the building in accordance with certain plans and specifications, it is not essential to the maintenance of an action upon the contract that there should be an exact performance of the contract in every minute particular; for, wherever divers acts and things of different degrees of importance are to be done on one side in return for a stipulated remuneration on the other, the performance of all the things in every minute particular is not, in general, a condition precedent to the liability to make some remuneration; but, if the contract has been substantially fulfilled, the plaintiff is entitled to maintain an action upon it (*g*), the defendant being entitled to such a deduction from the contract price as will enable him to complete the work in exact accordance with the contract. In every contract for work there is a condition implied by law that the work shall be done in a proper and workmanlike manner; but this is not a condition going to the essence of the contract. "If it were a condition precedent to the plaintiff's remuneration," observes Tindal, C. J., "a

(*f*) *Munro* v. *Butt*, 8 Ell. & Bl. 752; *Ellis* v. *Hamlen*, *ante*, p. 393.

(*g*) *Ante*, p. 190.

little deficiency of any sort would deprive the plaintiff of all claim for payment; but under such circumstances a jury may say what the plaintiff really deserves to have" (*h*).

A building contract, with all its specifications and details, may be broken to the letter with trifling damage to the employer; and, if performance in every minute particular were made a condition precedent to the builder's right to sue upon the contract for work done, "a trifling injury to the one party might occasion the loss of all remuneration to the other for a long and laborious service" (*i*). But, where it appears from the whole tenor of the agreement, that the parties thereto intended, the one to insist upon, and the other to submit to, conditions, however unreasonable and oppressive, the court will in such case give effect to them (*j*).

Where a party engages to do certain work on certain specified terms and in a certain specified manner, but does not perform the work so as to correspond with the specification, he is not entitled to recover the price agreed upon in the specification, nor can he recover according to the actual value of the work done, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work to make it correspond with the specification (*k*). And the defendant is not, by reason of his having given evidence of such breach of contract on the part of the plaintiff, and obtained a reduction of the agreed price, according to the difference between the value of the work actually done and that which ought to have been done according to the contract, precluded from bringing his cross action to recover compensation for any special damage he may have sustained by reason of the non-compliance by the plaintiff with the strict terms of the engagement (*l*). Although the defendant may give evidence of such breach of contract in reduction of damages, he is not bound to do so, but may pay the whole of the contract price, and bring a cross action for damages for the non-performance and defective performance of the work done (*m*). Care must be taken to mark the distinction between an action on the special contract itself for the agreed price of the work, and an action upon a bill of exchange or promissory note given by way of payment of the amount. In the former the value of the work only can be recovered; in the latter

(*h*) *Lucas* v. *Godwin*, 3 Bing N. C. 744, 4 Sc. 509.

(*i*) Tindal, C. J., *Stavers* v. *Curling*, 3 Sc 755.

(*j*) *Stadhard* or *Stannard* v *Lee*, 3 B. & S. 364; 32 L. J. Q. B. 75.

(*k*) *Thornton* v. *Place*, 1 Mood. & Rob. 218

(*l*) *Post*, p. 955; *Mondel* v. *Steel*, 8 M & W. 858, *Rigge* v. *Burbridge*, 15 M & W 599.

(*m*) *Davis* v. *Hedges*, L. R. 6 Q. B. 687.

the party holding bills given for the price of the work done can recover on them, unless there has been a total failure of the consideration. If the consideration fails partially, as by the inferiority of the work, the buyer must seek his remedy by a cross action. The contract may be divisible; but the security is entire (*n*). Where plans and specifications are prepared and persons invited to tender thereupon, there is no implied warranty that the work can be successfully done according to such plans and specifications (*o*).

Abatement of the contract price.—Whenever a contract for work and services on the one side, and payment on the other, has been so far executed as to give rise to a cause of action in respect of the work done, but has not been fully performed, it is competent to the defendant to show, in reduction of the price agreed to be paid, that the subject-matter of the contract is diminished in value by reason of the incomplete and inefficient execution of the work by the plaintiff. Thus, where the plaintiff agreed to erect a powerful warm-air apparatus in a chapel, and the defendant agreed to pay him the sum of 70*l.* for so doing, and the claim for the money was resisted on the ground that the apparatus was imperfect and did not answer, it was held by Tindal, C. J., that, if the apparatus was altogether unfit for the purpose, and did not at all answer the end for which it was intended, the defendant was not bound to pay for it; but that, if the apparatus was in the main effective, but not quite so complete as it ought to have been according to the contract, the action was maintainable for the price, and that the jury might deduct from the full price such a sum as would enable the defendant to do that which was required to make it complete and perfectly effective (*p*).

Effect of non-performance of building contracts by the time specified.—In the case of a contract to build a house, where the employer furnishes the land, which is the principal material for the work, if the house is not built by the time specified in the contract, but is afterwards completed, the employer who has got the house, and has had the value of his land increased by its erection thereon, can never be permitted to free himself from his obligation to pay for it by alleging that the work was not done by the time appointed. The stipulation as to time is not, in such a case, "a condition going to the *essence* of the contract. The parties never could have contemplated that, if the house were not completed by the day named, the builder should have no remuneration; at all events, if an engagement so unreasonable was contemplated

(*n*) *Tye* v. *Gwynne*, 2 Campb. 347.

(*o*) *Thorn* v. *Mayor of London*, 1 Ap. Cas. 120.

(*p*) *Cutler* v. *Close*, 5 C. & P. 338; *Chapel* v. *Hickes*, 2 Cr. & M. 214.

the parties should have expressed themselves with a precision that could not be mistaken" (q).

Penalties for non-performance of building contracts by a time specified.—Where, by articles of agreement for the altering and repairing of a warehouse for a fixed sum, it was stipulated that, in the event of the work not being fully completed in three months, the builder should "forfeit and pay" to the employer 5*l.* every week he should be engaged in such work beyond the three months, such penalty or forfeiture to be deducted from the amount which might remain owing on the completion of the work, it was held, in an action brought for extra work, that the employer was entitled to set off the penalty against the price of such extra work, and that he had a double remedy, either to set it off as payment, or to deduct it from the contract price (r). If performance by the time specified has been prevented by the ordering of extra work, or by the interference of the employer or his agent, the claim to the penalties cannot be enforced (s), unless there is an express stipulations that they may be (t).

Of the giving of security for the due performance of the contract.—If security is to be given by the workman for the due performance of his contract, the giving of the security is a condition precedent to any liability on the part of the employer upon the contract, unless the condition has been waived by the workman's being required to proceed with the work, or the work having been executed, without security (u).

Destruction of work before payment—Loss of materials, and loss of the price of the work.—If the contract is entire for the performance of a specific work for a specified sum, so that the performance of the whole of the work bargained for and agreed to be done is a condition precedent to the right to payment for any part of it, the workman will be deprived of all legal right to remuneration if the work is destroyed by accident before it has been completed (x); but, if the workman is entitled to payment from time to time as the work proceeds, the destruction of the work before its completion will not deprive the workman of his hire. Thus, if the contract is an entire and indivisible contract for the building of a house for a specific sum to be paid on its completion, and the

(q) Tindal, C. J., *Lucas* v. *Godwin*, 4 Sc. 509; 3 Bing. N. C. 744; *Littler* v. *Holland*, 3 T. R. 590; *Maryon* v. *Carter*, 4 C. & P. 295; *Kingdom* v. *Cox*, 2 C. B. 661; 15 L. J. C. P. 95.

(r) *Duckworth* v. *Alison*, 1 M. & W. 412; *Fletcher* v. *Dyche*, 2 T. R. 32; *Legge* v. *Harlock*, 12 Q. B. 1015.

(s) *Westwood* v. *Secret. Ind.*, 11 W. R. 261; 7 L. T. R. N. S. 736; *Russell* v. *Sa Da Bandiera*. 13 C. B. N. S. 149; 32 L. J. C. P. 68.

(t) *Jones* v. *St. John's College*, L. R. 6 Q. B. 115.

(u) *Roberts* v. *Brett*, 6 C. B. N. S 635; *Kingston* v. *Preston*, cited 2 Doug. 689.

(x) *Appleby* v. *Myers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331.

edifice is destroyed by lightning, fire, or tempest, during the progress of the work, the contractor must stand to the loss, and be himself at the expense of repairing the damage. But, if the contract price of the building is to be paid by instalments on the completion of certain specified portions of the work, each instalment becomes a debt due to the builder, as the particular portion specified is completed; and, if the house is destroyed by accident, the employer would be bound to pay the instalments then due, but would not be responsible for the intermediate work and labour and materials (y).

In the Roman law, if a builder was employed to build a house on the land of the employer, and the building was overthrown by an earthquake, or destroyed by lightning, during the progress of the work, the employer was accountable both for the materials which the undertaker of the work had furnished and for what was due on account of the workmanship, inasmuch as the materials and the produce of the labour became the property of the employer as soon as they were fixed on the land; but, if, by an express contract between the parties, the payment of the money was made conditional on the completion and approval of the building, so that nothing was due until the whole of the work had been performed, then the builder lost both the value of his materials and of his workmanship, and was bound to reconstruct the building before he called upon the employer for payment (z).

When the contract is entire and indivisible for the manufacture out of materials furnished by the employer of a particular chattel for a specific sum, to be paid on the completion and delivery of the chattel to the employer, and the chattel is destroyed by inevitable accident whilst it remains unfinished in the hands of the workman, the employer must stand to the loss of his materials, and the workman to the loss of the price and value of his labour. Thus, if a printer is employed to print a book at so much per sheet, the price and value of the printing to be paid for on the completion of the work, and, before the whole impression has been worked off and made ready for delivery, an accidental fire breaks out upon the printer's premises and consumes the work; the employer must stand to the loss of his paper, and the printer to the loss of the price and value of his labour and skill (a). But, if the work has been completed, and the copies have been printed and made ready for delivery, and placed at the disposal of the employer, they remain at his risk; and, if an accidental fire then

(y) *Menetone* v. *Athawes*, 3 Burr. 1592; *Tripp* v. *Armitage*, 4 M. & W 699; *post*, p. 929.

(z) Dig. lib. 19, tit. 3, lex 59; Dig. lib. 6, tit. 1, lex 39.

(a) *Gillett* v. *Mawman*, 1 Taunt. 140.

breaks out and consumes them, he must stand to the loss, and pay the printer his hire (*b*).

If a shipwright is employed to repair a ship, the accessorial materials supplied by him for the work become, as we have previously seen, the property of the employer, as soon as they are attached to the vessel under repair, upon the principle that *omne accessorium sequitur suum principale*; and, if the completion of the work is not made, either by agreement or by custom, a condition precedent to the payment, and the ship is accidentally burnt, the loss of such materials, as well as of the value of the work and labour employed upon them, is the loss of the employer and not of the workman, and the employer, consequently, must pay the fair value of the labour and materials, although he can reap no benefit from what has been done (*c*). But, where a man contracts to expend materials and labour on buildings belonging to and in the occupation of the employer, to be paid for on completion of the whole, and before completion the buildings are destroyed by accidental fire, the contractor is excused from completing the work, but is not entitled to any compensation for the work already done, which has perished without any default of the employer (*d*).

Where a contract for the building of a ship vests the general property in the ship in the employer as the materials are put together and fashioned (*e*), and the ship is destroyed by fire, the loss of the materials and workmanship will fall on the employer; but, if the property in the thing destroyed remains with the workman, the loss will fall upon the latter.

Deviations from building contracts—Extras—If work has been agreed to be done, and materials supplied, under a building contract for certain estimated prices, and there has subsequently been a deviation from the original plan by consent of the parties, the contract and estimate are not on that account excluded, but are to be the rule of payment, as far as the contract can be traced to have been followed, and the excess only is to be paid for according to the usual rates of charging, but if the original plan has been so entirely abandoned that it is impossible to trace the contract, and to say to what part of it the work shall be applied, the workman may charge for the whole work by measure and value, as if no contract at all had ever been made. But there must be a total deviation, so that the terms of the original contract are not applicable to the new work (*f*). For all work done beyond the

(*b*) *Adlard* v. *Booth*, 7 C. & P. 108.

(*c*) *Menetone* v. *Athawes*, 3 Burr 1592

(*d*) *Appleby* v. *Myers*, L. R. 2 C. P. 651; 36 L. J. C. P. 331.

(*e*) *Clarke* v. *Spence*, *post*, p. 930; *Wood* v. *Bell*, 25 L J Q B 153, 321.

(*f*) *Pepper* v. *Burland*, Peake, 139; *Robson* v *Godfrey*, Holt, N P. C. 236; *Ellis* v. *Hamlen*, 3 Taunt. 52.

contract, under subsequent or antecedent directions, the plaintiff may recover, just as if no special contract had ever been made (*g*). But the mere fact of the defendant having assented to certain alterations is not sufficient to make him liable to pay for them as extras not covered by the contract, unless the alterations are of such a nature that he cannot fail to be aware that they must increase the expense, and cannot be done for the contract price (*h*). If extras have been done by the plaintiff without any authority from the defendant, the latter is not bound to pay for them (*i*). If they are to be done only on the direction in writing of the architect, a direction in writing must be obtained (*k*). In cases of variation set up by way of defence, the courts look to the subsequent conduct of the parties, for this obvious reason, that, as the parties intend the contract to remain in force, so far as it is not varied, it is only by comparing the conduct of the parties subsequently to the making of the alleged variation with the terms originally agreed upon that the court can determine with certainty upon oral evidence that such variations were mutually intended to take effect

Prevention of performance of building contracts.—Where an agreement was entered into between the plaintiff and defendant that the plaintiff should pull down the walls of three houses and erect for the defendant, on the site thereof, a malt-house and other buildings, and the plaintiff was ready and offered to do the work, but the defendant prevented him, it was held that the plaintiff had done all that was necessary to be done to enable him to sue the defendant for a breach of contract (*l*). The builder or workman is not in such a case entitled to recover the full stipulated remuneration as if the buildings had been actually erected. A fair deduction must be made from the contract price in respect of the value of materials which have never been supplied and wages which have never been paid; and the damages must be confined to the actual pecuniary loss sustained by the plaintiff (*m*).

Of the right of lien of workmen and artificers.—Every workman to whom a chattel has been delivered by the owner to be mended, repaired, or altered for hire, and who has bestowed his labour upon it, has a lien upon the chattel for his hire. This right of lien is a mere right of retainer until the pecuniary

(*g*) *Thornton* v. *Place*, 1 Mood. & Rob. 219; *Fletcher* v. *Gillespie*, 3 Bing. 637.

(*h*) *Lovelock* v. *King*, 1 Mood. & Rob. 60.

(*i*) *Dobson* v. *Hudson*, 1 C. B. N. S. 659; 26 L. J. C. P. 153.

(*k*) *Myers* v. *Sarl*, 30 L. J. Q. B. 9; *Russell* v. *Sa Da Bandeira*, 13 C. B. N. S. 149; 32 L. J. C. P. 68.

(*l*) *Peters* v. *Opie*, 1 Ventr. 177; 2 Saund. 350; *Collins* v. *Price*, 5 Bing. 132; *Ferry* v. *Williams*, 8 Taunt. 70; 1 Moore, 498.

(*m*) *Masterton* v. *Mayor, &c., of Brooklyne*, 7 Hill. N. Y. Rep. 61.

claim has been satisfied, and carries with it no right of sale (n). A workman who has detained a chattel in the exercise of a right of lien is not entitled, in the absence of any usage of trade, to charge warehouse rent or the expense of keeping the chattel (o).

Wherever a workman has bestowed work and labour or skill in repairing or improving a chattel at the request, or by the employment of the owner, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if a price has been fixed by agreement (p). Thus the artificer to whom goods are delivered to be worked up, the shipwright to whom a vessel has been delivered to be repaired (q), the printer to whom paper has been delivered to be printed (r), the miller who has ground corn or meal at his mill (s), the horsebreaker or trainer by whose skill a horse is trained and rendered manageable (t), the stallion-keeper who has received a mare to be covered by his stallion, have each a lien for their hire, or the customary charges for their services, unless there be some express or tacit understanding between the parties to the particular contract inconsistent with the exercise of such a right. But where no work is to be done upon the chattel to improve or increase its value, or to carry it from one place to another for hire, no lien attaches upon it. Thus, if a power of attorney, or an authority to receive money, is intrusted to a bailee in order that he may exhibit it as a voucher, he has no lien upon the document for money due to him from the bailor. Where a mortgage deed was delivered to an auctioneer in order that he might obtain payment of the principal and interest due thereon, and the auctioneer made several applications for the money, it was held that he had no lien upon the deed for his charges (u).

The lien of the manufacturer and workman extends only to the principal chattels placed in his hands to be worked up, and not to the accessorial materials which may have been furnished by the employer, and left upon the premises of the manufacturer or workman unused. Thus, where oil, madder, dyewood, and fustic were furnished to scribblers and fullers by a person who sent them cloth to be scribbled and fulled and dyed upon their premises, it was held that the lien of the scribblers and fullers was confined to

(n) *Thames Iron Works, &c.* v. *Patent Derrick Co.*, 29 L. J. Ch. 714.

(o) *Somes* v. *Brit. Emp. &c.*, 30 L. J. Q. B. 229; 28 *ib.* 221; E. B. & E. 353; 8 H. L. Cas. 338.

(p) *Chase* v. *Westmore*, 5 M. & S. 183.

(q) *Franklin* v. *Hosier*, 4 B. & Ald. 341; *Williams* v. *Allsup*, 10 C. B. N. S. 417; 30 L. J. C. P. 353; as to a maritime lien, see *The Two Ellens*, L. R. 3 Adm & Eccl. 345, *ib.* 4 P. C. 161.

(r) *Blake* v. *Nicholson*, 3 M. & S. 167.

(s) *Chase* v. *Westmore*, 5 M. & S. 180;

(t) *Bevan* v. *Waters*, 3 C. & P. 520; *Jacobs* v. *Latour*, 2 M. & P. 201; 5 Bing. 130; *Scarfe* v. *Morgan*, 4 M. & W. 284.

(u) *Sanderson* v. *Bell*, 2 Cr. & M. 304.

the cloth, and did not extend to the oil, &c., furnished by the employers, and left upon the premises after the scribbling and fulling had been completed (x). And where a stereotype printer received stereotype plates from his employer to print from, it was held that his lien for printing was confined to the paper, and did not extend to the plates from which he printed. But such a lien may be established by custom and the usage of trade, or by agreement of the parties (y).

Liabilities of taskworkmen.—Every person who has entered into a contract for the performance of a particular task or job is bound to enter upon his employment without delay; to be active, industrious, careful, and diligent in the performance of the work; to do it according to orders given and assented to (z); to complete it within a reasonable period, if no precise time has been agreed upon for its fulfilment; and to exercise a reasonable amount of care and skill in its execution. If the work is to be performed under the direction of a surveyor to be appointed by the employer, the appointment of such surveyor is a condition precedent to the liability of the workman to commence his task; and, if the surveyor is not appointed within a reasonable period, the workman is released from his engagement to do the work (a). In ordinary cases, the workman may accomplish the work through the medium of inferior agents and workmen; but, if the work is a work of art and genius, and the contract is founded upon the personal talent and capacity of the artist, he impliedly undertakes to perform the work himself, and may not intrust it to an inferior agent of less skill and reputation (b).

Of the implied obligation to do the work well—Skilled workmen.—Every person who professes to be a skilled workman impliedly undertakes to do his work well and in a workmanlike manner, and according to the rules and principles of his trade or art. "When a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if he cannot succeed; and he should know whether he will or not" (c). The public profession of an art is a representation and undertaking, to all who require and make use of the services of

(x) *Cumpston* v. *Heigh*, 2 Sc. 684.

(y) *Bleaden* v. *Hancock*, M. & M. 465.

(z) *Streeter* v. *Horlock*, 7 Moore, 287.

(a) *Coombe* v. *Greene*, 11 M. & W. 483.

(b) *Le principe, que le conducteur peut faire l'ouvrage par un autre, reçoit exception à l'égard des ouvrages de génie dans lesquels on considère le talent personnel de celui à qui on le donne a faire; comme, lorsque j'ai fait marché avec un peintre pour peindre un plafond, il ne lui est pas permis de la faire faire par un autre sans mon consentement.* Poth. Louage, No. 421; *Robson* v. *Drummond*, 2 B. & Ad. 308; *British Waggon Co.* v. *Lea*, 5 Q. B. D. 149.

(c) Bayley, J., *Duncan* v. *Blundell*, 3 Stark. 7, cited 5 M. & P. 548; *C'est de sa part une faute de se charger d'une chose qui surpasse ses forces.* Pothier, Louage, 404, No. 525.

the professed artisan, that the latter is possessed of, and will exercise, the ordinary amount of skill and knowledge incident to his particular craft, art, or profession (*d*). If, therefore, an accountant is employed to make out an account, and he miscalculates the amounts and carries wrong balances to the injury of the employer, he is responsible in damages to the latter (*e*). If a carpenter undertakes to roof a barn, and employs defective materials, or does his work so negligently and unskilfully that the thatch sinks and lets in the wet, he is liable for the injury to the building so occasioned (*f*). Where a carpenter undertook to build a booth on a race-course, and the booth fell down in the middle of the races from bad materials and bad workmanship, it was held that the carpenter was responsible for the damage that had been sustained (*g*). The degree of skill and diligence which is required from the workman rises in proportion to the value, the delicacy, and the beauty of the work, and the fragility and brittleness of the materials. The Roman law required the exercise of greater skill and diligence from workmen who undertook the delicate work of raising or removing pillars of granite and porphyry, than from those who were employed upon common materials; and greater care from a person who undertook to remove a column, than from a man who was employed in the transport of a rude block of stone (*h*). Clockmakers, jewellers, opticians, and all kinds of skilled workmen and all persons belonging to the learned professions (except barristers), are responsible in damages if they profess to accomplish more than they are able to perform, and undertake works of skill without being possessed of sufficient skill, or apply less than the occasion requires (*i*). "Every person," observes Tindal, C. J., "who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon impliedly undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill, but he undertakes to bring a fair and competent degree of skill" (*k*). So a chymist will be liable for negligence in compounding hair wash, by which the plaintiff's wife was injured (*l*); and a patent

(*d*) *Harmer* v. *Cornelius*, 5 C. B. N. S. 246; 28 L. J. C P. 85.

(*e*) *Story* v. *Richardson*, 8 Sc. 291; 6 Bing. N. C. 123.

(*f*) *Basten* v. *Butter*, 7 East, 479; *Moneypenny* v. *Hartland*, 2 C. & P. 378; Pothier (Louage), No. 427; Tr. des Oblig. No. 163.

(*g*) *Broom* v. *Davis*, 7 East, 480, n. (*a*).

(*h*) Dig. lib. 19, tit. 2, lex 25, s. 7.

(*i*) *Seare* v. *Prentice*, 8 East, 352; *Slater* v. *Baker*, 2 Wils 359.

(*k*) *Lanphier* v. *Phipos*, 8 C. & P. 479; *Hancke* v. *Hooper*, 7 C. & P. 81.

(*l*) *George* v. *Skivington*, L. R. 5 Exch. 1. This case is disapproved of in *Heaven* v. *Pender*, 9 Q. B. D. 302, as there was no contract with the wife. See, however, *Thomas* v. *Winchester*, 6 N. Y. 397 See *post*, p. 442.

agent for negligence in not being aware of a legal decision which made an important change in the practice of obtaining patents (*m*).

Work rendered useless by the negligence or incompetence of the workman.—Whenever the work contracted to be done is a work of art and skill, and the undertaker, being charged with the bare work, executes it so negligently and unskilfully as to render it utterly useless to the employer, he cannot call upon the latter for payment of it. Thus, where a builder contracted with the defendant to re-build the front of his house, and built it out of the perpendicular, so that it was in danger of falling, and required to be taken down, it was held that the builder could not maintain an action in respect of such defective execution of the work. "If there has been no beneficial service," observes Lord Ellenborough, "there shall be no pay" (*n*). And, where a man undertook to erect a stove in a shop, and to lay a tube under the floor, which would carry off the smoke, and the plan entirely failed, and the stove could not be used, it was held that he was not entitled to an action in respect of his work and labour in the erection of the stove (*o*). "If a man contracted with another to build him a house for a certain sum, it would surely not be sufficient for him to show that he had put together such a quantity of brick and timber; he ought to be prepared to show that he had done the stipulated work according to his contract" (*p*). When a building is so negligently constructed as to be dangerous and unfit for use, the employer may require the builder to take down the structure and rebuild it; and, if the builder neglects so to do, and refuses to fulfil his part of the contract, the employer may give him notice to remove his materials from off the land, and may resist payment of any portion of the price of the work. If he retains the materials, and makes use of them, he will be bound to pay their fair value; but, if the materials are altogether useless, or the employer has suffered from the breach of contract on the part of the workman more damage and injury than they are worth, he is not bound to pay anything (*q*).

Useless and unskilful professional services.—If a surgeon requires his patient to undergo an operation which turns out to have been altogether useless or unnecessary, he cannot make it the subject of a pecuniary claim or charge on such patient. If a medical man ignorantly and unskilfully administers improper medicines, and the patient, consequently, derives no benefit from

(*m*) *Lee* v. *Walker*, L. R. 7 C. P. 121

(*n*) *Farnsworth* v. *Garrard*, 1 Campb. 38; *Denew* v. *Daverell*, 3 Campb. 451.

(*o*) *Duncan* v. *Blundell*, 3 Stark. 6; *Hayselden* v. *Staff*, 5 Ad. & E. 161.

(*p*) Le Blanc, J., *Basten* v. *Butter*, 7 East, 484.

(*q*) Tindal, C. J., *Hill* v. *Featherstonehaugh*, 5 M. & P. 514, 548; *Farnsworth* v. *Garrard*, 1 Campb. 38; Pothier, Louage d'ouvrage, No. 434.

his attendance, the medical man is not entitled to any remuneration for what he has done; but, if he has employed the ordinary amount of skill in his profession, and has applied remedies fitted to the complaint, and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure being then attributable to some peculiarity in the constitution of the patient, for which the medical man is not responsible (r). If a surveyor, engineer, or architect, from negligence or want of skill, gives his employers a grossly incorrect estimate of the cost of certain works, and thereby leads them into unnecessary expenses, he is not entitled to be paid for his plans, estimates and specifications (s). But, if the incorrectness of the estimate arises from the inherent difficulties in the work itself, the employer will not be relieved from the obligation of payment. If a solicitor conducting a suit is guilty of misconduct and negligence, by reason whereof all the previous steps taken in the cause become useless, he cannot recover his charges for any part of the business he has done; but, if the suit fails from causes over which the solicitor has no control, the case is otherwise (t). If a solicitor issues a writ and proceeds thereon in a court of special and peculiar jurisdiction, he is bound to acquaint himself with the machinery and practice of the court, and to see that it is adequate for the purposes of the suit; and, if the suit fails from the ignorance of the solicitor in this respect, he cannot recover his costs and charges of the abortive proceedings (x). If a parliamentary agent employed to obtain an act of parliament draws the clauses of the bill himself, and frames them so negligently and carelessly that one of the main objects of the statute cannot be accomplished, the negligence may deprive him of all right to remuneration, or it may go merely in reduction of the value of his services (y).

Actions against solicitors for negligence.—Every solicitor employed by a purchaser of freehold or leasehold property impliedly undertakes to exercise reasonable care and skill in the investigation of the title of the vendor. If his client has purchased leasehold property under conditions that he is to have no abstract of the vendor's title, and that the lessor's title is not to be objected to, or gone into, this will not exonerate the solicitor from the duty of investigating the vendor's title so far as to ascer-

(r) *Kannen* v. *McMullen*, Peake, 83; *Hupe* v. *Phelps*, 2 Stark. 480.

(s) *Moneypenny* v. *Hartland*, 2 C. & P. 378.

(t) *Bracey* v. *Carter*, 12 Ad. & E. 373; *Long* v. *Orsi*, 13 C. B. 615; 26 L. J. C. P. 127; *Stokes* v. *Trumper*, 2 Kay & J. 232; *Chapman* v. *Van Toll*, 8 Ell. & Bl. 396; 27 L. J. Q. B. 1.

(x) *Cox* v. *Leech*, 1 C. B. N. S. 617; 26 L. J. C. P. 125.

(y) *Baker* v. *Milward*, 8 Ir. C. L. R. 514.

tain that there is a lease to him creating the interest he professes to sell, and that it has been duly registered where registration is necessary (z). But a solicitor is not liable to an action for negligence, at the suit of one between whom and himself the relation of solicitor and client does not exist, for giving, in answer to a casual enquiry, erroneous information as to the contents of a deed (a).

A solicitor is liable for the negligence of his agent (b), partner (c), or clerk (d). The obligation of the solicitor is towards his client and not towards a stranger (e). Yet, if he undertakes without authority to act for any person he is liable for negligence (f).

The solicitor having accepted the retainer is in general bound to prosecute the matter intrusted to him to its termination, but not if he cannot obtain his fees or security for them, and he gives reasonable notice of throwing up the retainer (g). The retainer is at an end when judgment is recovered (h), but it may be renewed (i). A solicitor who has been retained to conduct an action, and who, after judgment in favour of his client, is authorised to do his best for the purpose of obtaining the fruits of the judgment, has control over the process of execution so far as such purpose is concerned, and may consent to the withdrawal of a *fi. fa.* (k). He may also accept payment of the debt by instalments if it is for the client's advantage to do so, but he has no implied authority to enter into an agreement on his behalf to postpone execution (l).

The solicitor is not liable upon points of new occurrence, or of nice or doubtful construction (m), but he must show himself acquainted with the ordinary practice of his profession (n).

It is the duty of every attorney and solicitor to act with fidelity to his client, and to keep the secrets of the latter; for "if a man, being intrusted in his profession, deceive him who intrusted him, or if a man retained of counsel become afterward of counsel with the other party in the same cause, or discover the evidence or

(z) *Allen* v. *Clark*, 11 W. R. 304; as to the receipt of money for investment by one of several solicitors in partnership, see *ante*, p. 365.

(a) *Fish* v. *Kelly*, 17 C. B. N. S. 194.

(b) *Simons* v. *Rose*, 31 Bea. 11.

(c) *Norton* v. *Cooper*, 3 Sm. & Giff. 375; *Dundonald* v. *Masterman*, L. R. 7 Eq. 504; 38 L. J. Ch. 350; *Bickford* v. *D'Arcy*, L. R. 1 Ex. 554; 35 L. J. Ex. 202.

(d) *Floyd* v. *Nangle*, 3 Atk. 568; *Prestwick* v. *Poley*, 18 C. B. N. S. 806; 34 L. J. C. P. 189.

(e) *Fish* v. *Kelly*, 17 C. B. N. S. 194.

(f) *Westaway* v. *Frost*, 17 L. J. Q. B. 286; see Horace Smith on Negligence, p. 128.

(g) *Wadsworth* v. *Marshall*, 2 Cr. & J. 665; *Hoby* v. *Built*, 3 B. & Ad. 350; *Van Sandau* v. *Browne*, 9 Bing. 402.

(h) *Flower* v. *Bolingbroke*, 1 Str. 639; *Brackenbury* v. *Pell*, 12 East, 588; *Macbeth* v. *Ellis*, 4 Bing. 578; see Horace Smith on Negligence, p. 129.

(i) *Butler* v. *Knight*, L. R. 2 Ex. 109; 36 L. J. Ex. 66.

(k) *Levy* v. *Abbott*, 4 Ex. 588; 19 L. J. Ex. 62.

(l) *Lovegrove* v. *White*, L. R. 6 C. P. 440.

(m) *Godefroy* v. *Dalton*, 6 Bing. 468; *Laidler* v. *Elliot*, 3 B. & C. 738.

(n) *Hunter* v. *Caldwell*, 10 Q. B. 69, 83; all the cases of negligence are collected in the editor's book on Negligence.

secrets of the cause; or if an attorney act deceptively, to the prejudice of his client, or make default by collusion with others whereby his client is injured, an action lies for damages" (o). If an attorney, when his client's deeds are put into his hands, for the purpose of raising money, discloses defects of title to the person who was about to lend, and the client sustains damage therefrom, the attorney is responsible for neglect of duty, and cannot shelter himself from the consequences by showing that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him; for whenever an attorney finds that he has a conflicting duty to discharge towards his several clients, he must at once withdraw from the inconsistent employment, and decline to act in the matter. Whenever the attorney has his client's title-deeds put into his hands for any purpose whatever, "he is to consider his lips sealed with a sacred silence as to the whole of their contents" (p).

It is also the duty of every attorney, by reason of the emolument he receives for the exercise of his professional skill, to take care that his client does not enter into any covenant or stipulation that may expose him to a larger responsibility than the nature of the business he is instructed to transact may, in the ordinary course of practice, require. If the stipulations are more onerous in their consequences than usual, the matter should be fully explained to the client, and the unusual extent of liability be made known to him (q).

If an attorney conducting a suit neglects to comply with the practice or orders of the court, and neglects to take some necessary step in the cause, by means whereof all the previous proceedings become useless, he will be responsible in damages to his client (r). And the same consequences follow if he brings an action for his client, within a limited jurisdiction, on a cause of action manifestly arising out of the jurisdiction (s), or negligently suffers judgment to go by default when he is retained to defend an action (t); or fails to instruct counsel properly, and to deliver briefs in sufficient time to enable his counsel effectively to perform the duty

(o) Com. Dig. *Action on the Case for Deceit*, A. 5; as to their duty to keep accounts, see *Ex parte Neville*, L. R. 4 Ch. App. 43. As to their duty to see that a charge on the property of a company is duly registered, as directed by sect. 43 of the Companies Act, see *Ex parte Valpy and Chaplin*, L. R. 7 Ch. App. 289. No agreement between an attorney and his client as to the former's remuneration made in pursuance of the Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), will absolve such attorney from the consequences of his negligence; see s. 7.

(p) Tindal, C. J. *Taylor* v. *Blacklow*, 3 B. N. C. 235.

(q) *Stannard* v. *Ullithorne*, 4 M. & Sc. 376; 10 Bing. 491.

(r) *Bracey* v. *Carter*, 12 Ad. & E. 373; *Frankland* v. *Cole*, 2 Cr. & J. 590; *Pitt* v. *Yalden*, 4 Burr. 2063.

(s) *Williams* v. *Gibbs*, 6 N. & M. 788.

(t) *Godfrey* v. *Jay*, 5 M. & P. 297; 7 Bing. 419.

intrusted to him; or if he is not present in person, or by his agent at the trial, to see that the witnesses are forthcoming when called upon (*u*). When present at the trial, it is the duty of the attorney not to suffer the case to be called on, unless he has previously ascertained that all the necessary witnesses are in attendance (*x*); but he is not bound to search after his counsel, nor is he answerable for the non-attendance or neglect of the latter (*y*). If he has received instructions from his client not to compromise an action he is retained to prosecute, he will be guilty of a breach of duty if he does compromise, and cannot shelter himself from an action by showing that it was done under the advice of counsel (*z*), although that circumstance might go in reduction of damages. But in the absence of a distinct prohibition to compromise, the general authority of an attorney is sufficient for that purpose (*a*).

"It would be extremely difficult," observes Tindal, C. J., "to define the exact amount of skill and diligence which an attorney undertakes to furnish in the conduct of a cause. The cases, however, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of his court (*b*), for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession; but he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually intrusted to men in the higher branch of the profession of the law, unless he has thought fit to act upon his own judgment and opinion respecting matters which ought to have been laid before counsel" (*c*). "I think it would be most [illegible]," said Alderson, B., "if an attorney were to be precluded from recovering his fair remuneration merely because he has made a mistake in an Act of Parliament" (*d*).

If an attorney is employed to investigate the title to an estate or to seek out an eligible investment, and obtain good security for money advanced, and the title is obviously defective, or the security is manifestly bad or insufficient, the attorney will be responsible

(*u*) *Hawkins* v. *Harwood*, Exch. 506; 19 L. J. Exch. 33; *De Rouffigny* v. *Peale*, 3 Taunt. 483; *Swannell* v. *Ellis*, 8 Moore, 340: 1 Bing 317.

(*x*) *Reece* v. *Rigby*, 4 B. & Ald. 202.

(*y*) *Lowry* v. *Guildford*, 5 C. & P. 234.

(*z*) *Fray* v. *Voules*, 1 El. & El. 839; 28 L. J. Q. B. 232; *Butler* v. *Knight*, L. R. 2 Exch. 109.

(*a*) *Prestwick* v. *Poley*, 34 L. J. C. P. 189; *Butler* v. *Knight*, *supra*.

(*b*) *Lee* v. *Walker*, *ante*, p. 406; and see *post*, Contract of Sale.

(*c*) *Godefroy* v. *Dalton*, 6 Bing. 468; *Purves* v. *Landell*, 12 Cl. & Fin. 98; *Shilcock* v. *Passman*, 7 C. & P. 292; *Kemp* v. *Burt*, 4 B. & Ad. 431; *Long* v. *Orsi*, 18 C. B. 610; *Cox* v. *Leech*, 1 C. B. N. S. 617; *Ireson* v. *Pearman*, 3 B. & C. 812, 813; *Townley* v. *Jones*, 8 C. B. N. S. 289.

(*d*) *Elkington* v. *Holland*, 9 M. & W. 661; *Laidler* v. *Elliot*, 3 B. & C. 738.

for his negligence both at common law and in equity (*e*). But he is not responsible for an advance on a mortgage which turns out a deficient security, if he has taken the opinion of a competent survéyor as to the value of the property (*f*). He is not justified in relying upon an extract from a will furnished to him by his client, unless the latter agrees to take the entire responsibility upon himself; but he ought to search for and examine the original will (*g*). If he relies upon his own judgment and opinion as to the interpretation and legal operation of deeds and conveyances, he does so at his peril. If he draws a wrong conclusion from them, he will be responsible in damages to his client. He ought, therefore, to lay them before counsel, if he wishes to avoid the responsibility of acting upon his own judgment respecting them (*h*).

If, when retained by a client who is about to advance his money on the security of a mortgage, he has reason to suspect that the intended mortgagor has been insolvent, or in embarrassed circumstances, he will be responsible for a breach of duty if he neglects to make searches in the proper quarter to ascertain whether such intended mortgagor has ever taken the benefit of the Insolvent Act (*i*); or to make inquiry whether there are any existing incumbrances on the property (*k*).

By the Attorneys and Solicitors Act, 1870 (*l*), agreements may be made between solicitors and their clients with respect to the remuneration of the former; but, by sect. 7, a provision in any agreement that the solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such solicitor, is wholly void. By sect. 8, no action can be brought upon any such agreement, but the agreement may be enforced in the manner indicated in the section. It has been held that this section only applies to prevent actions to recover sums in lieu of costs after the work is done, and not to an action for refusing to allow a solicitor to do the work (*m*). The above statute does not apply to conveyancing or non-contentious business, agreements as to which are regulated by the Solicitors' Remuneration Act, 1881 (*n*).

Negligence of barristers.—There is no instance of any action having been successfully brought against a barrister for neglect of duty; but if a barrister intentionally does a wrong, and acts with

(*e*) *Knight* v. *Quarles*, 4 Moore, 532; 2 B & B. 102; *Whitehead* v. *Greetham*, 10 Moore, 183; 2 Bing. 464; *Howell* v. *Young*, 5 B. & C. 259; *Chapman* v. *Chapman*, L. R. 9 Eq. Ca. 276.

(*f*) *Chapman* v. *Chapman*, *supra*; as to his duty to get the best price for the property entrusted to him for sale, see *Morgan* v. *Steble*, L. R. 7 Q. B. 611.

(*g*) *Wilson* v. *Tucker*, 3 Stark. 156.

(*h*) *Ireson* v. *Pearman*, 3 B. & C. 813; 5 D. & R. 699.

(*i*) *Cooper* v. *Stephenson*, 21 L. J. Q. B. 292.

(*k*) *Hopgood* v. *Parkin*, L. R. 11 Eq. Ca. 74; see *Ratcliffe* v. *Barnard*, L. R. Ch. App. 652.

(*l*) 33 & 34 Vict. c. 28.

(*m*) *Rees* v. *Williams*, L. R. 10 Ex. 200.

(*n*) 44 & 45 Vict. c. 44, ss. 8, 9.

malice, fraud, or treachery in the discharge of his professional duties he will be responsible, like every other wrong-doer, for the mischief thereby occasioned (*o*).

Negligence of surveyors or valuers.—Where the plaintiff undertakes to perform work to the satisfaction of the defendants' surveyor, payment to be made only on the certificate of such surveyor, if the defendants and the surveyor collude to withhold the giving of the certificate to prevent the plaintiff from being paid for his work, there is abundant authority, both at law and in equity, that the defendants cannot shelter themselves by means of any such misconduct (*p*). But a declaration against the defendant, that his surveyor wrongfully and improperly neglected and refused to give his certificate, discloses no cause of action, for that would be to substitute the opinion of a jury for a certificate of the surveyor, which it was the very object of the contract to prevent (*q*). Where two persons were employed to value between the incoming rector and the representatives of the deceased incumbent, and the defendant through ignorance of the true principle for the valuation of ecclesiastical dilapidations, valued so favourably to the opposite party and adversely to the plaintiff, that his valuation was accepted, it was held that he was liable for the results of his ignorance (*r*).

Negligence of bankers.—It has never been decided whether there is any legal obligation on a banker not to disclose the state of his customer's account except upon a reasonable and proper occasion; but, assuming that such an obligation exists, the question what is a reasonable occasion is clearly one for the jury to decide, and if the customer sustain any special damage by the banker having disclosed the state of his account, the banker would, it seems, be responsible (*s*). A banker is not liable for the loss of a box left under his care by a customer for safe custody, of which the customer keeps the key, and for which no payment is made, if it be stolen by one of the clerks of the bank, unless the loss was occasioned by gross negligence on the part of the banker (*t*). But if a banker or banking company undertake the custody of securities for a customer and charge a commission for the receipt of the dividends from them, they would, it seems, be liable for negligence, if they left the securities in the uncontrolled power of their clerk or manager, who fraudulently disposed of them (*u*).

If the customer of a banker, who is desired to keep his cheque-

(*o*) *Swinfen* v. *Ld. Chelmsford*, 5 H. & N. 918; 29 L. J. Exch. 382.

(*p*) Erle, C. J., *Clarke* v. *Watson*, 34 L. J. C. P. 148.

(*q*) *Clarke* v. *Watson*, *supra*.

(*r*) *Jenkins* v. *Betham*, 15 C. B. 168; 24 L. J. C. P. 94.

(*s*) *Hardy* v. *Veasey*, L. R. 3 Exch. 107.

(*t*) *Giblin* v. *McMullen*, *ante*, p. 356.

(*u*) *Re United Service Co.*, L. R. 6 Ch. App. 212.

book locked up, nevertheless negligently leaves it on his table, and thereby enables his servant to get possession of it, and tear out a cheque and forge his master's signature to it, and commit a fraud upon the bankers, this will not enable the bankers to throw the loss upon their customer, as being the result of his negligent keeping of his cheque-book, for it could not reasonably have been anticipated that the power of obtaining a cheque would induce a servant to commit a forgery (*x*).

Negligence of public officers.—Public officers in respect of their judicial or discretionary duties are not liable for negligence, but they are liable for negligence in respect of their ministerial duties. Where they perform duties for reward at the request of individuals, they are liable for negligence and are not protected, merely because they act *bonâ fide* and to the best of their skill and judgment, but they are bound to conduct themselves in a skilful manner (*y*). Public officers who are servants of the Government, are not responsible for the negligence of their subordinates; but public officers who act in a *quasi* public capacity at the request of individuals, are liable for the acts of those whom they employ. Thus Commissioners appointed by the Crown are liable for the negligent acts of persons employed by them (*z*).

Negligence of surgeons, &c.—After due allowance has been made for the difficult nature of the duty undertaken by a medical man, any negligence upon his part becomes a serious matter, both because he has by undertaking a difficult duty promised to use great skill, and because the consequences of his negligence may be most disastrous. To render a medical man liable for negligence or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he has himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result (*a*).

A medical man having once undertaken a case cannot desert it without reasonable cause, just as a solicitor cannot abandon the suit of his client (*b*).

(*x*) *Bank of Ireland* v. *Trustees of Evan's Charity*, 5 H. L. C. 411; *Swan* v. *North Brit. Austr. Co.*, *supra*; *Taylor* v. *Gt. Ind. Penins.*, 28 L. J. Ch. 285; *ib.* 714; see *Donaldson* v. *Gillott*, L. R. 3 Eq. Ca. 274; *Johnston* v. *Renton*, L. R. 9 Eq. Ca. 181; *Re United Service Co.*, L. R. 6 Ch. App. 212.

(*y*) Horace Smith on Negligence, p. 133; *Jones* v. *Bird*, 5 B. & Ald. 837.

(*z*) *Mersey Docks* v. *Gibbs*, L. R. 1 H. L. 111. See also *Reg.* v. *Treasury*, L. R. 7 Q. B. 387.

(*a*) *Rich* v. *Pierpont*, 3 F. & F. 35; see the cases in the present editor's book on the Law of Negligence, p. 125.

(*b*) Shearman on Negligence, s. 441. As to solicitors, see *Hoby* v. *Built*, 3 B. & Ald. 349.

Where an action for negligence was brought against a surgeon, and it was proved that the plaintiff's mother sent for the defendant, and that the plaintiff's father paid him, it was held that the plaintiff's submitting to the defendant's treatment was no sufficient proof that the defendant had been employed by the plaintiff (*c*).

If I hire the labour and services and skill of a surgeon, an apothecary, a farrier, a solicitor, or any other professional person, he impliedly undertakes for the possession and exercise of ordinary skill and knowledge in the practice of his art or profession, and is responsible for any injury I may sustain from his neglect to exercise such skill (*d*). In one case it was ruled by Cockburn, C. J., that surgeons who give their services gratuitously (as at hospitals) were not liable for the negligence of those employed under them (*e*); but it seems that a surgeon who acts gratuitously ought at least to take ordinary care (*f*). Physicians could not at common law recover their fees, unless under a special contract (*g*), but surgeons could (*h*); and now by 21 & 22 Vict. c. 90 s. 31, physicians can recover their fees and need not show any special contract.

An unqualified person who acts as a doctor is equally bound to bring competent skill to the performance of the duty which he has undertaken (*hh*).

Wilful selection of unqualified persons.—The employer himself is bound to exercise ordinary caution and discrimination in the choice and selection of the party he employs. If he selects a common quack or an unauthorised practitioner, the latter is responsible only for a reasonable and *bonâ fide* exertion of his capacity. He is bound to exercise such skill as he actually possesses; and, if he has done his best and failed, he cannot be made responsible for a want of skill; for it was the employer's own fault to trust an unlearned and unskilful person, known not to be regularly and properly qualified. If the employer "voluntarily employs in one art a man who openly exercises another, his folly," observes Sir William Jones, "has no claim to indulgence; and, unless the latter makes false pretensions or a special undertaking, no more can be fairly demanded of him than the best of his ability. The case which Sadi relates with elegance and humour in his Gulistan, or Rose Garden, is not inapplicable to the present subject. 'A man who had a disorder in his eyes called on a farrier for a remedy; and he applied to them a medicine com-

(*c*) *Gladwell* v. *Steggall*, 8 Sc. 67; 5 C. B. N. S. 733.

(*d*) *Seare* v. *Prentice*, 8 East, 352; *Slater* v. *Baker*, 2 Wils. 359; *Hancke* v. *Hooper*, 7 C. & P. 84; *Lanphier* v. *Phipos*, 8 C. & P. 479.

(*e*) *Perionowski* v. *Freeman*, 4 F. & F. 982.

(*f*) Horace Smith on Negligence, p. 125.

(*g*) *Chorley* v. *Bolcot*, 4 T. R.

(*h*) *Battersby* v. *Lawrence*, C. & M. 277.

(*hh*) *Ruddock* v. *Lowe*, 4 F. & F. 519.

monly used for his patients. The man lost his sight, and brought an action for the damages;' but the judge said, 'No action lies; for, if the complainant had not himself been an ass, he would never have employed a *farrier*.' And Sadi proceeds to intimate that, 'if a person will employ a common mat-weaver to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly'" (*i*).

Arbitrators.—A person who is appointed, and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill, or knowledge, or care, but only to act honestly and *bonâ fide*; and this doctrine applies, not only to an arbitrator, properly so called, but to every person who has taken upon himself to determine a disputed matter between two persons who have agreed to be concluded by his opinion (*k*). And although, where the matter to be determined by the referee is one of value only, that is not strictly an arbitration (*l*); yet, where in ascertaining the value of property or the amount of compensation to be paid, the matter assumes the character of a judicial inquiry, to be conducted upon the ordinary principles of judicial inquiries, by hearing the parties and the evidence of their witnesses, that is an arbitration, and not merely a valuation (*m*). Where two valuers are appointed to ascertain the price to be paid for the good-will, stock, and fixtures of a business, with a reference to decision of an umpire, if they differ; there is no arbitration until the umpirage takes effect (*n*).

Bailment of materials to workmen to be manufactured or repaired for hire.—When chattels or materials for work have been bailed or delivered to a workman to be repaired, made up, or dealt with by him in the way of his trade, he is bound to take all reasonable and ordinary forethought and precaution for their protection and preservation; and, if a loss has occurred from robbery, or from fire or inundation, or from waste or decay, he must show that he had taken all such precautions as are ordinarily taken by prudent men to guard against the mischief. If clothes are delivered to a fuller to be dressed, and he suffers them to be eaten by mice, he will be responsible for the damage, unless he can discharge himself from all imputation of neglect, by showing that he had been subjected to some unusual and unexpected visitation

(*i*) Bailments, citing Rosar. Polit. c. 7.

(*k*) *Pappa* v. *Rose*, L. R. 7 C. P. 32, 525; 41 L. J. C. P. 187; *Tharsis Sulphur Co.* v. *Loftus*, L. R. 8 C. P. 1; *Stevenson* v. *Watson*, 4 C. P. D. 148.

(*l*) *Collins* v. *Collins*, 28 L. J. Ch. 184; *Bos* v. *Helsham*, L. R. 2 Ex. 72.

(*m*) *Re Hopper*, L. R. 2 Q. B. 372.

(*n*) *Turner* v. *Goulden*, L. R. 9 C. P. 57

from such vermin. The very occurrence of the disaster affords a strong *primâ facie* presumption of a want of ordinary caution (*o*). Where a ship, bailed to a shipwright to be repaired, was put into a dry dock belonging to the shipwright, and whilst she lay there a high tide arose, and pressed against the dock gates; and it appeared that the gates might have been shored up so as to resist the pressure of the water, but nothing was done, and the water at last burst open the gates and dashed the bailor's vessel against another vessel, it was held that the bailee was responsible for the injury, as he might, by proper precautions, have guarded against the accident (*p*). Wherever the loss of the thing bailed arises from the want of the degree of care which, from the nature of the bailment, ought to be exercised, it is immaterial whether the negligence be imputable personally to the bailee or to the servants employed by him (*q*).

Negligent keeping of goods by warehousemen, and depositaries for hire.—All persons to whom goods and chattels are delivered to be kept for hire and reward, and who are paid expressly and specifically for the exercise of their labour and care in keeping them, and not merely for the finding of a place of deposit, are bound to exercise that amount of care and vigilance for their preservation, which the most prudent and careful of men exercise for the protection of their own property (*r*). If the goods are injured by mice or rats, the warehouseman will be responsible for the damage (*s*), although he keeps cats to destroy vermin (*t*). It is no answer to an action against a warehouseman for the non-delivery of a chattel intrusted to him to keep for hire, to say that he has lost it (*u*); the mere fact of the loss is *primâ facie* proof of negligence, and he must rebut this presumption by showing that he had taken the greatest care of the thing intrusted to him, and had no means of preventing the loss. A booking-office keeper who receives money for booking parcels, is bound to put them into a safe place, and if he leaves them in a public room, or an open shop, and they are lost or stolen, he will be responsible to the owner (*x*).

(*o*) In the Roman law proof of such a disaster was held to be proof of negligence. "Si fullo vestimenta polienda acceperit; eaque mures roserint, ex locato tenetur, quia debuit ab hâc re cavere:" Dig. lib. 19, tit. 2, lex 13, s. 5.

(*p*) *Leck* v. *Maestaer*, 1 Campb. 137.

(*q*) Ld. Campbell, C. J., *Dansey* v. *Richardson*, 3 Ell. & Bl. 169; 23 L. J. Q. B. 228.

(*r*) "Quod si horrearius nominatim custodiam mercium in se recepit, videtur locasse operas non solum exactæ, sed etiam *exactissimæ* custodiæ;" Pandect. Just. ed. Poth. lib. 19, tit. 2, art. 3, 72.

(*s*) *White* v. *Humphrey*, 11 Q. B. 44.

(*t*) *Laveroni* v. *Drury*, 8 Exch. 166; see *Kay* v. *Wheeler*, L. R. 2 C. P. 302.

(*u*) *Cairns* v. *Robins*, 8 M. & W. 258; *Reeve* v. *Palmer*, 5 C. B. N. S. 84; *Goodman* v. *Boycot*, 2 B. & S. 1; 31 L. J. Q. B. 69.

(*x*) *Dover* v. *Mills*, 5 C. & P. 175; as to passengers' luggage deposited in railway cloak rooms, see *ante*, p. 357.

Loss of chattels by wharfingers.—The duties and responsibilities of the wharfinger, in respect of the safe keeping of the goods intrusted to him, to be dealt with in the way of his trade, are analogous to those of the warehouseman. If he receives directions to shift them on board a particular vessel, he does not discharge his duty by delivering them to one of the crew; but he is bound to place them in the hands of the captain, or some person in authority on board the vessel (*y*). If he is clothed merely with the custody of the goods, and the duty of shipping them devolves, by usage and custom, upon the master of the vessel to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the master and officers of such vessel, although they are not actually removed from the wharf (*z*)

Loss of cattle.—Liabilities of agisters of cattle.—A person who receives cattle or horses, or living animals to keep for the owner, and is paid expressly for his care and watchfulness in preserving them, as well as for their sustenance, is bound to take the utmost care of them, and he is responsible for damage and injury resulting from ordinary casualties, if such damage might have been averted and prevented by the exercise of great care and vigilance. Very slight evidence of neglect has been sufficient to induce juries to return verdicts in favour of those who have sought compensation for the loss of cattle delivered to bailees to be kept for reward. Thus, where the defendant, a farmer, had received the plaintiff's horse to agist for a certain price, and the horse strayed and was lost, and never after heard of, and the plaintiff gave evidence of the gates having been occasionally seen left open, and the fences being in parts out of order, but it did not appear directly that the horse had strayed through any defect in the fences, or through any of the gates being left open, the jury, nevertheless, returned a verdict against the defendant for the full value of the horse (*a*). If the bailee suffers his defences to be defective, or puts the horse into a dangerous pasture, and the animal, by reason thereof, is lost or injured, this is a degree of neglect for which he is undoubtedly responsible (*b*). Where an agister placed the plaintiff's horse in a field where there were heifers, knowing that a bull was in the habit of getting into the field, though he did not know it was vicious, and the bull gored the horse, it was held that the *scienter* was immaterial, as he had contracted to take reasonable care, and had not done so (*c*).

(*y*) *Leigh* v. *Smith*, 1 C. & P. 638, 641; 2 Esp 695.

(*z*) *Cobban* v. *Downe*, 5 Esp 41; Story on Bailments, 293; Jones on Bailments, 97.

(*a*) *Broadwater* v. *Blot*, Holt, 547.

(*b*) *Mosley* v. *Fosset*, 1 Roll Abr. 4. See Add on Torts, 5th ed by Cave, p. 355

(*c*) *Smith* v. *Cook*, L. R. 1 Q. B. D. 79.

Theft by servants.—If the subject-matter of the bailment is secretly purloined by the bailee's servant, the bailee will be responsible for the loss, unless he can show that he could not, by the exercise of the greatest vigilance, have guarded against the theft; but he will not be responsible for a robbery by irresistible violence (*d*). Where a chronometer, bailed to a watchmaker to be repaired for hire, was placed by the bailee in a drawer in his shop amongst a variety of common watches, part of which belonged to the bailee, and the rest to his customers, which drawer was locked at night, and in a recess in the same room stood a strong iron chest, in which watches belonging to the watchmaker, of the value of several thousand pounds, were deposited and locked up, and in the night the drawer was broken open by the watchmaker's servant, who slept in the shop, and the chronometer was stolen by him, together with the other watches there deposited, but the watches in the iron chest remained untouched, it was held, that as the watchmaker had taken more care of his own watches, by locking them up in the iron safe, than he had taken of the bailor's chronometer, he was responsible for the loss, and Dallas, C. J., was of opinion that the watchmaker "was bound to protect the property against depredation from those who were within the house" (*e*).

Distinction between robbery and theft.—A very sensible distinction is taken in the civil law between a public palpable robbery by force and violence, when a house is broken into and robbed of its contents, and a theft or secret purloining of goods. In the one case, the bailee relieved himself from responsibility for the loss by proof of the mere fact of the robbery (*f*), it being considered that individual care or vigilance could avail but little against the open attack of the determined robber; in the other, he was bound to make good the loss, unless he could show that he had taken the greatest care of the thing intrusted to him, and that it had been purloined, notwithstanding every precaution for its safety (*g*). Where an officer in the army, on leaving London, delivered a trunk containing divers articles of value to an upholsterer to be kept for a shilling a week, and the trunk was returned to the officer emptied of its contents, which were supposed to have been stolen by the upholsterer's servant, it was held by Lord Kenyon, that if the upholsterer had taken as much care of

(*d*) *Walker* v. *British Guarantee Ass.*, 21 Law J. Q. B. 260; 18 Q. B. 277.

(*e*) *Clarke* v. *Earnshaw*, Gow, 30

(*f*) Dig. lib. 17, tit. 2, lex 52, 53; Instit. lib. 3, tit. 15, s. 2, 3.

(*g*) "Ad casus autem fortuitos non sunt referendi illi casus, qui cum culpâ conjuncti esse solent; cujusmodi sunt *furta*. Quamobrem, qui rem *furto* amissam dicit, *is diligentiam suam probare debet*;" Vin. Com. ad Instit. lib. 3, tit. 15, s. 5; Pothier (Pret a Usage), art. 53; Abbott, C. J., in *Robinson* v. *Ward*, Ry. & M. 276.

the articles as he had taken of his own property, he was not responsible for the theft committed by his servant (h); but every depositary of chattels to be kept for hire is *primâ facie* responsible for a theft committed by his own servants within the house (i), and can only discharge himself from liability by showing that the theft was committed under such circumstances, or was of such a nature, that the greatest care and vigilance on his part could not have guarded against it, or prevented it.

Losses occasioned by the negligence of the bailor.—If the owner himself in any way conduces to the loss; if he brings people to the warehouse or place of deposit to look at the goods, opens packages in which they are contained, &c., and the loss is as likely to have arisen from the misconduct of the persons so introduced, or from the carelessness of the owner, as from the neglect of the warehouseman or bailee, the latter is not responsible for the loss. Thus, where a quantity of ginseng contained in a box was deposited by the plaintiff in the defendant's warehouse, and the plaintiff was in the habit of resorting to the box, and ordering the lid to be taken off, for the purpose of showing the ginseng to expected purchasers, who came to the warehouse to view it on the invitation of the plaintiff, and rats at last got into the box and destroyed the ginseng, it was held that the defendant, the warehouseman, was not responsible for the loss (k).

Negligence of bailors.—It is the duty of every bailor of dangerous, explosive, and combustible substances, knowing the dangerous nature of them, to take care that the danger is communicated to a bailee to whom they are delivered to carry, to take care of, or to keep; and if the bailor fails to make the necessary disclosure, he is responsible if an accident occurs, and damages are sustained by the bailee or his servant (l).

Fraudulent concealment of the dangerous nature of articles delivered to a bailee to be warehoused or carried.—Every person who conceals in boxes and packages articles known by him to be of an explosive, corrosive, or combustible and dangerous nature, and delivers them to another to be warehoused or carried with other goods by land or by sea, and fails to disclose the dangerous nature of the articles to the bailee, is guilty of a tortious act, and is responsible for all the consequences of his carelessness, unless the bailee knew of the dangerous nature of the articles, and the

(h) *Finucane* v. *Small*, 1 Esp. 315.

(i) *Hodgson* v. *Fullarton*, 4 Taunt 787; Dallas, C. J., in *Clarke* v. *Earnshaw*, Gow, 32; Campbell, C. J., and Coleridge, J., in *Dansey* v. *Richardson*, 3 Ell. & Bl. 156–171; 23 Law J. Q. B. 223–229; *De Rothschild* v. *Royal Mail*, &c., *Co.*, 7 Exch. 734; 21 Law J. Exch. 273.

(k) *Cailiff* v. *Danvers*, 1 Peake, N. P. C. 155; Add. on Torts, 5th ed. by Cave, 23–26.

(l) *Farrant* v. *Barnes*, 32 L. J. C. P. 137.

danger and risk attendant upon the receiving and dealing with them. And it is no answer to aver that the articles were well known in trade and commerce, and that the plaintiff knew what they were, without an express averment that he knew them to be dangerous (*m*).

"It is clearly a tortious act," observes Crompton, J., "for the consequences of which shippers are responsible, to ship goods apparently safe and fit to be carried, and from which the shipowner is ignorant that any danger is likely to arise, without notice of such goods being dangerous, if the shipper is aware of such danger. Such shipment when the *scienter* is made out is clearly wrongful and tortious; but it does not seem that there is any authority decisive on the point as to whether the shipper is liable for shipping dangerous goods without a communication of their nature, when neither he nor the shipowner are aware of the danger. It seems very difficult to hold that the shipper can be liable for not communicating what he does not know. Lord Ellenborough's dictum (*n*) would tend to show that knowledge of the party shipping is an essential ingredient. I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or the means of knowledge, of the dangerous nature of the goods when shipped, or where he has been guilty of some negligence as shipper, as by shipping without communicating danger which he had the means of knowing, and ought to have communicated" (*o*).

Deposit of goods under a special contract.—In a contract of bailment, the bailee may impose any fair and reasonable terms he pleases upon the bailor, and may make his acceptance of the goods to be kept and his responsibility for the re-delivery of them dependent upon those terms being assented to and observed by the parties who deal with him; but if he accepts the goods and takes them into his possession, he will not be allowed to impose terms utterly repugnant to, and inconsistent with, any contract at all. Where public notice is given of the terms upon which goods are received, or the terms are printed on a paper or receipt delivered to the bailor, and it is sought to hold him to the terms on the ground that he has impliedly assented to them, it should be shown that the terms are reasonable and fair, and not devised for the purpose of fraud or extortion, or for the purpose of exonerating the bailee from responsibility for his own negligence and misconduct (*p*).

(*m*) *Hutchinson* v. *Guion*, 5 C. B. N. S. 149; 28 Law J. C. P. 63.

(*n*) *Williams* v. *East Ind. Co.*, 3 East, 192.

(*o*) *Brass* v. *Maitland*, 6 Ell. & Bl. 486; *Gibbon* v. *Paynton*, 4 Burr. 2298; *Batson* v. *Donovan*, 4 B. & Ald. 33, 37.

(*p*) Byles, J., *Van Toll* v. *S. E. Ry.*

Detention of chattels by bailees under a claim of lien.—The detention of chattels by a bailee is frequently justified on the ground that the bailee has a right to hold them in his hands until some pecuniary demand upon or in respect of them has been satisfied by the bailor.

The right of lien, when once established, is not destroyed by reason of the remedy for the recovery of the debt secured by the lien being barred by the statute of limitations (*q*). And it will exist, although it arises out of an immoral consideration, if the plaintiff cannot recover without relying on the immorality, on the principle of *in pari delicto potior est conditio possidentis* (*r*).

Right of lien.—If a defendant, having a lien upon goods, refuses to deliver them up on demand, and claims to retain them on grounds quite distinct from a claim of lien, his refusal will be evidence of a conversion, and the existence of the lien will be no answer to an action for the conversion of the property (*s*). But a person does not waive his right of lien merely by omitting to mention it when the goods are demanded; and if he claims a right to detain them, in respect of two separate sums claimed to be due to him, and he has a lien only in respect of one of those sums, his refusal is no evidence of a conversion, unless the sum in respect of which the lien exists is tendered (*t*). "Where a person," observes Alderson, B., "has no right of property in goods in his possession, but merely a right of lien, he has no right to sell them; and if he does sell the goods he thereby puts an end to his lien" (*u*); but where goods have been deposited as security for a loan of money to be repaid on a day certain, there is an implied power of sale in case of default in payment on the day named (*x*). An unauthorised dealing with a pledge will not, it seems, revest the property in the pledgor, though it may give him a right of action for any damage actually caused by such unauthorised proceeding (*y*). And it has been held, that a lender of money on the security of railway stock has no right to realise the security during the currency of the loan, and that, if he does so, the owner may recover from him the price he got for the stock, if it is to his interest to do so (*z*).

Co., 12 C. B. N. S. 75; 31 Law J. C. P. 245; *Peek* v. *North Staff. Ry. Co.*, 10 H. of L. Ca. 473; this subject is more fully illustrated, *post*, Ch. II., s. 4, *Carriers, Passengers' Luggage*, p. 544

(*q*) *Spears* v. *Hartley*, 3 Esp. 81; *Re Broomhead*, 16 Law J. Q. B. 355.

(*r*) *Taylor* v. *Chester*, L. R. 4 Q. B. 309, 38 L. J. Q. B. 225

(*s*) *Cannee* v. *Spurrton*, 8 Sc. N. R. 714; 7 M. & Gr. 903; *Dirks* v. *Richards*, 5 Sc. N. R. 534; 4 M. & Gr. 574; *Weeks* v. *Goode*, 6 C. B. N. S. 367.

(*t*) *Scarfe* v. *Morgan*, 4 M. & W. 281; *Kerford* v. *Mondel*, 28 Law J. Exch. 303

(*u*) *White* v. *Spettigue*, 13 M. & W. 603.

(*x*) *Pigot* v. *Cubley*, 15 C. B. N. S. 701, 33 Law J. C. P. 134.

(*y*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Exch. 299

(*z*) *Langton* v. *Waite*, L. R. 6 Eq. Ca. 165.

Where the plaintiff had agreed to buy of the defendant a stack of hay for 86*l*., to be paid for when taken away, and to be removed by the 31st of May, and part only of the hay was paid for, and removed by the time appointed, whereupon the defendant, in the month of August following, cut up and consumed the residue of the hay, and the plaintiff afterwards tendered the unpaid purchase-money, and demanded the hay, and sued the defendant for converting it to his own use, it was held that the defendant's lien on the hay was determined by the act of conversion; that from the moment the defendant used the hay in a manner inconsistent with his claim of lien, his lien ceased, and a right of possession accrued to the purchaser (*a*). Where, however, some apples which had been sold by the defendant to the plaintiff at an agreed price, to be paid on a given day, were deposited in a kiln in an outhouse on the defendant's premises, and the key of the kiln was given by the defendant to the plaintiff, but the defendant kept the key of the outer door of the outhouse, and, the day of payment being passed, the defendant gave the plaintiff notice to take and pay for the apples, and, no attention being paid to this notice, the defendant carried them away and resold them, and the plaintiff then brought an action for a conversion of them, it was held that the defendant was entitled to a verdict under a plea denying the plaintiff's right of possession of the apples (*b*).

A person cannot set up a right of lien which is at variance with the terms or conditions, or implied understanding, upon which he received the property.—Thus, if a livery-stable keeper takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be re-delivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep (*c*), or for money paid by him to a veterinary surgeon for blistering the horse according to the owner's directions (*d*), the right of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he requires them for the purpose of milking (*e*). And if a trainer of race-horses holds

(*a*) *Gurr* v. *Cuthbert*, 12 Law J. Exch. 309.

(*b*) *Milgate* v. *Kebble*, 3 M. & Gr. 100; 3 Sc. N. R. 358.

(*c*) *Judson* v. *Etheridge*, 1 C. & M. 743; *Yorke* v. *Grenaugh*, 2 Ld. Raym. 868.

(*d*) *Orchard* v. *Rackstraw*, 19 Law J. C. P. 303.

(*e*) *Jackson* v. *Cummins*, 5 M. & W. 342; *Chapman* v. *Allen*, Cro. Car. 273.

them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer cannot lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with the existence of a right of lien (*f*). If a policy of insurance is deposited for safe custody only, the depositary cannot set up a lien upon it for an antecedent debt (*g*). If a person receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due to him from the latter (*h*). If a ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the shipowner (*i*). Whenever goods in the hands of a bailee or depositary are, by the terms of the contract, to be re-delivered to the owner at some stated period, or "if by the agreement the plaintiff is to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee cannot set up any lien" (*k*). A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed (*l*). "If security" (such as a bill, note, or bond) "is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone" (*m*).

If a person, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he cannot afterwards, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal. Where, therefore, a warehouseman, on being applied to for brandy which had been delivered to him for safe custody, refused to give it up, saying that it was his own property, it was held that he could not afterwards justify his refusal on the ground that warehouse rent was due to him, and was not tendered at the time the brandy was demanded (*n*), "for it would be absurd to offer the expenses of keeping the goods to one who insisted on retaining them as his own property" (*o*). But a person does not, of course, lose his right of lien by merely omitting to mention it when the goods are demanded. And if he claims a right to retain them for

(*f*) *Forth* v. *Simpson*, 13 Q. B. 685.

(*g*) *Muir* v. *Fleming*, D. & R., N. P. C. 30.

(*h*) *Key* v. *Flint*, 8 Taunt. 23; 1 Moore, 451; *Buchanan* v. *Findlay*, 9 B. & C. 749.

(*i*) *Burn* v. *Brown*, 2 Stark. 273.

(*k*) *Crawshay* v. *Homfrey*, 4 B. & Ald. 52.

(*l*) *Raitt* v. *Mitchell*, 4 Campb. 146.

(*m*) *Hewison* v. *Guthrie*, 3 Sc. 298; 2 B. N. C. 759; *Cowell* v. *Simpson*, 16 Ves. 280; *Horncastle* v. *Farran*, 3 B. & Ald. 497.

(*n*) *Boardman* v. *Sill*, 1 Campb. 410, *n.*; *Weeks* v. *Goode*, 6 C. B. N. S. 367.

(*o*) *White* v. *Gainer*, 9 Moore, 45.

two separate charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists (*p*).

Parties against whom a lien may be claimed.—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, cannot in general deal with it so as to create a right of lien thereon as against the true owner (*q*), unless the person in whose possession the property is placed is a public innkeeper, or common carrier, or common ferryman, or is bound to exercise his craft in favour of all who require his services. Where the owner of a pony phaeton entrusted the phaeton to a painter to be painted, and the latter carried it to the premises of the defendant, who was in the habit of taking carriages to stand on his premises for hire, and there left it, and, the phaeton never having been painted or brought back, the plaintiff, after the expiration of three months, made search for it, and found it on the premises of the defendant, who claimed a lien on it for the price of the standing-room, it was held that the defendant had no such lien (*r*). And where a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coach-maker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coach-maker had no lien upon the chaise as against the master for the price of the repairs (*s*). It would seem also, from the adjudged cases, that if a servant is directed to take a carriage to *A.* to be repaired, and he by mistake takes it to *B.*, *B.* would have no lien upon it for the price of the repairs, as the servant was not authorised to employ *B.* in the matter. This may be law, but it is hardly just, and opens a wide door to fraud, as it is impossible for the coach-maker to be cognisant of the particular directions given by the master to the servant. If the servant has received general directions to get the carriage repaired, he may then of course give a right of lien to any coach-maker he may employ to do the repairs (*t*). It has been held, that if a person obtains the property in goods by fraud, and pawns them, before the seller has avoided the contract, the pawnee is entitled to a lien upon them for the money advanced as against the seller (*u*). But the possession of the goods by the pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property to

(*p*) *Scarfe* v. *Morgan*, 4 M. & W. 281.

(*q*) *Hartop* v. *Hoare*, 3 Atk. 44; *Lempriere* v. *Pasley*, 2 T. R. 485; *Castellain* v. *Thompson*, 13 C. B. N. S. 105.

(*r*) *Buxton* v. *Baughan*, 6 C. & P. 674.

(*s*) *Hiscox* v. *Greenwood*, 4 Esp. 174.

(*t*) *Weldon* v. *Gould*, 3 Esp. 268.

(*u*) *Parker* v. *Patrick*, 5 T. R. 175;

which he has no colour of title, the *jus tertii* may always be set up against the pawnor by the pawnee (*x*).

General lien is a right on the part of the manufacturer, or workman, factor, broker, or commission agent for the sale of goods, warehouseman or wharfinger, into whose hands goods have been placed, to be worked up, repaired, improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the person claiming it. When custom and usage of trade are relied upon as establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed to be cognisant of it, and to have contracted subject to the usage; but, as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

Where persons carry on a trade or business in which a general lien is recognised, they cannot claim a general lien in respect of goods or securities which are, by agreement, held for a particular purpose, or under special conditions inconsistent with the claim of a general lien (*y*). A general lien cannot be set up in opposition to the terms and conditions upon which the goods were received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he cannot set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods (*z*). And if a debtor deposits a bill of exchange with his creditor, in order that the latter may get the bill discounted and pay over the proceeds to the debtor, the creditor cannot set up a lien upon the bill for the general balance due to him (*a*). In some places, dyers, calico-printers, fullers, warehousemen, wharfingers, and packers, have been held, in accordance with

doubted in *Peer* v. *Humphrey*, 2 Ad. & E. 499; said to be good law by Parke, B., in *Load* v. *Green*, 15 M. & W. 219, and Cresswell, J., in *White* v. *Gardon*, 20 Law J. C. P. 168.

(*x*) *Cheesman* v. *Exall*, 6 Exch. 345.

(*y*) *Bock* v. *Gorrissen*, 2 De G. F. & J. 434, 30 Law J. Ch. 42.

(*z*) *Walker* v. *Birch*, 6 T. R. 262.

(*a*) *Key* v. *Flint*, 1 Moore, 451; 8 Taunt. 21.

the proved usage of their several trades in the particular locality, to have a lien on goods sent to them to be dyed, printed, warehoused, worked upon, or taken care of, not only for the work done upon, or in respect of, the particular goods in their possession, but also for their charges of dyeing, printing, warehousing, &c., other goods which had previously been delivered back to their owners (*b*) : and in other places, where no such usage has been shown to exist, they have been held to have no such general lien (*c*). The usage, when it exists, must be shown to be long established, and notorious, fair, and reasonable, and not contrary to any established principle of law (*d*). It has been held that a publisher has a lien upon any one or more parts or numbers of a work, for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work (*e*); also, that an agent who carries on business, in his own name, on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liability which he has incurred in the conduct and management of the business (*f*).

Notice that goods will be held subject to a general lien.—The right to retain for a general balance may, with certain exceptions presently noticed, be created by the express contract of the parties. Every workman and artificer not being a public innkeeper, common carrier, or common ferryman, and not being bound to exercise his calling in favour of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien, if he thinks fit so to do. Thus, where the dyers, dressers, bleachers, whisters, printers, and calenderers of Manchester, and the neighbourhood, came to a public resolution or agreement, at a public meeting in Manchester, that they would receive goods to be dyed, dressed, bleached, &c., on the condition that such goods should not only be subject to the debts for the work and labour performed upon them, but also for the general balance due from the persons employing them for work and labour of the same kind performed upon goods which they had already delivered out of their possession, it was held that persons who had sent goods to the dyer or fuller, with notice of this resolution, conceded to them a lien for their general balance (*g*).

(*b*) *Savill* v. *Barchard*, 4 Esp. 52; *Naylor* v. *Mangles*, 1 *ib.* 109; *Spears* v. *Hartley*, 3 *ib.* 81; *Rose* v. *Hart*, 8 Taunt. 499; 2 Moore, 547; *Webb* v. *Fox*, 2 Peake, N. P. C. 167.

(*c*) *Green* v. *Farmer*, 4 Burr. 2214; 1 W. Bl. 651; *Holderness* v. *Collinson*, 7 B. & C. 216.

(*d*) *Rushforth* v. *Hadfield*, 6 East, 528; *Leuckhart* v. *Cooper*, 3 Sc. 521; 3 B. N. C. 99.

(*e*) *Blake* v. *Nicholson*, 3 M. & S. 167.

(*f*) *Forcraft* v. *Wood*, 4 Russ. 488.

(*g*) *Kirkman* v. *Shawcross*, 6 T. R. 14.

General lien by custom of trade — Warehousekeepers — Wharfingers.—Where certain public warehousekeepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all public warehousekeepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such public warehousekeepers were employed, for all moneys or any balance thereof due from such merchants to such public warehousekeepers for their advances, expenses, and charges, &c., it was held that the custom was bad, as the general lien claimed was not confined to goods the property of the person who employed or retained the warehousekeeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods, during any antecedent period of time, and that to an unlimited extent; which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade, for no foreign merchant would consign his goods to this country for sale, if they could be made liable, whilst warehoused for custody, to satisfy a debt already due from the factor to the warehousekeeper, in respect of other goods (*h*). Dock companies have no general lien for wharfage charges, and cannot detain the goods of one man to satisfy wharfage dues and charges incurred by another (*i*). If a wharfinger has a general authority to receive all goods directed for *A. B.*, and goods come to his wharf directed by mistake for *A. B.*, the real owner of the goods cannot take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from *A. B.* to him (*k*).

Extinguishment of lien by abandonment of possession.—If a bailee who has a right of lien upon property in his possession voluntarily parts with the possession of such property, the lien is gone; so that if he afterwards recovers possession of the property, his right of lien does not revive (*l*); but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished (*m*). Possession of goods and chattels may be given up, and the right of lien extinguished,

(*h*) Tindal, C. J., *Leuckhart* v. *Cooper*, 3 Sc. 531; 3 B. N. C. 99; 35 Hen. 6, 33, cited *Rex* v. *Humphery*, McClel. & Y. 193.

(*i*) *Dresser* v. *Bosanquet*, 32 Law J. Q. B. 57: 4 B. & S. 460, 486.

(*k*) *Richardson* v. *Goss*, 3 B. & P. 123.

(*l*) *Sweet* v. *Pym*, 1 East, 4.

(*m*) *Wallace* v. *Woodgate*, R. & M. 194.

although the goods and chattels are never actually removed from the premises of the party having the lien (*n*). And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody have been held to be the servants of such masters, holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship (*o*).

The right of lien being a mere personal right, which cannot be parted with, it follows that a bailee who has got a lien cannot sell his right to another, nor can he transfer, as we have just seen, the property over which the lien extends, to another, without losing his right of lien (*p*), unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale (*q*), for there is a clear distinction in this respect between a lien, which is a mere personal right of detention, and a pledge deposited to secure the repayment of money (*r*). An innkeeper, consequently, cannot sell the horse of his guest for the expense of his keep, except within the city of London (*s*). A sheriff cannot sell an interest of this description, and he cannot, consequently, seize property covered by the lien under an execution against the party claiming the lien (*t*); but if the execution is against the owner of the goods, he is entitled then to seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself, by express contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and to re-establish his lien, provided the rights of no third person have intervened.

Statutory power of sale in discharge of a right of lien.— By the Merchant Shipping Act, 1862, power is given to wharf or warehouse owners, in certain cases, to sell by public auction goods placed in their custody, and apply the proceeds of the sale in satisfaction and discharge of the charges upon them (*u*).

Tender of the debt in extinguishment of the right of lien.— Wherever a person has a lien upon goods for the payment of

(*n*) *Jacobs* v. *Latour*, 2 M. & P. 205.
(*o*) *Reeves* v. *Capper*, 5 B. N. C. 136.
(*p*) *Clerk* v. *Gilbert*, 2 B. N. C. 357.
(*q*) See *Johnson* v. *Stear*, 33 L. J. C. P. 130.
(*r*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585.
(*s*) *Jones* v. *Pearle*, 1 Str. 556.
(*t*) *Legg* v. *Evans*, 6 M. & W. 42; see *Young* v. *Lambert*, L. R. 3 P. C. Ca. 142.
(*u*) 25 & 26 Vict. c. 63, ss. 73—76.

money due upon them, whether he be an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt, the lien may be at once extinguished, and a right to the possession of the goods created, by a tender of the money due upon them (x). Where a lease was deposited with the defendants as a security for the repayment of 150*l.* on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects, the defendants were to be at liberty, after notice, to sell the lease and to deduct the expenses of the sale, the principal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or tendered, there was an end of all the stipulations as to what should be done with the lease in the event of the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease (y).

Transfer of the bailment.—In all cases of bailment of chattels by one person to another for hire or reward, it is essential that the bailee should preserve his dominion and control over the property, and his power of restoring it to the owner. If, therefore, he parts with the possession of the chattel, and places it under the dominion and control of a stranger, the bailment is determined, and the owner has a right of action for the recovery of the thing bailed (z).

Where, after a bailment of chattels, the bailor has transferred all his interest in the chattels to another, the bailee is entitled to have an order or authority from the bailor to deliver them to his transferee, or a reasonable time to make inquiry and ascertain the validity of the new title of the claimant before he can be made responsible in damages for the non-delivery of the chattels to the latter (a). Where, for example, goods have been bailed by the owner to a warehouse-keeper, to be kept, and the owner has subsequently sold the goods to a purchaser, the warehouse-keeper is not responsible for refusing to deliver the goods to the purchaser without the production of a delivery-order from the bailor, or some documentary evidence of title to the goods on the part of the stranger who demands them; but he may, if he

(x) *Ratcliff* v. *Davis*, Cro Jac 244

(y) *Chilton* v. *Carrington*, 15 C. B. 105.

(z) *Cooper* v. *Willomat*, 1 C. B. 682.

(a) Add. on Torts, 5th ed. by Cave, p. 465, *Lee* v. *Bayes*, 18 C. B. 607; 25 Law J. C. P. 249; *Solomons* v. *Dawes*, 1 Esp. 82.

pleases, at once attorn to the purchaser, and rely upon the title of the latter (*b*).

If the bailee has received the chattels upon the terms that he is to deliver them to the bailor, or to any person authorized by him to receive them, a *bonâ fide* purchaser or mortgagee, who is in possession of a bill of sale, or assignment, or mortgage, executed by the bailor, transferring all the bailor's interest in the chattels to such purchaser or mortgagee, may, on presenting such bill of sale or mortgage to the bailee, lawfully demand possession of the chattels, and in case of the refusal of the latter to deliver them to him within a reasonable time after the demand, may maintain an action for the conversion or detention of the property (*c*), the bill of sale or mortgage, signed by the bailor, being an authority or direction to the bailee to deliver up the chattels to the purchaser or mortgagee; but if there be a mere oral agreement of sale, and no warrant, or authority, or direction from the bailor for the delivery of the goods, the refusal of the bailee to deliver them to the stranger would be no proof of a conversion or of a wrongful detainer. It is to a case of this sort, where there has been a mere oral transfer of chattels by a bailor, without any warrant or authority from the latter to the bailee to deliver them to the transferee, that the dictum of Holt, C. J., must be taken to apply, that if *A.* bail goods to *C.*, and after give his whole right to them to *B.*, *B.* cannot maintain detinue for them against *C.*, because the special property that *C.* acquires by the bailment is not thereby transferred to *B.* (*d*). If the right of property in the subject-matter of the bailment has been transferred by devise; the devisee may sue for the detention or loss of the property, and it is no answer to the action to show that the subject-matter of the bailment was lost in the lifetime of the devisor, and has not been in the possession of the bailee since the accrual of the title of the devisee (*e*). So, if the right of property in title-deeds, or an heirloom, comes to the heir-at-law by descent, the heir is the proper person to sue for their detention (*f*).

If the bailor is not himself the owner of the goods, but has some special property therein, or is himself a bailee of them, and answerable over to the real owner, he is entitled to maintain an action for damage done to them, or for the loss of them (*g*).

A bailee is not estopped, as we have seen, from showing that the bailor had a defeasible title, and that his title has been

(*b*) *Ogle* v. *Atkinson*, 5 Taunt. 762; *Cheesman* v. *Exall*, 6 Exch. 341; Add. on Torts, 5th ed. by Cave, p. 465.

(*c*) *Franklin* v. *Neate*, 13 M. & W. 481; 1 Roll. Abr. DETINUE, C. 2, 3; Add. on Torts, *supra*.

(*d*) *Rich* v. *Aldred*, 6 Mod. 216.

(*e*) *Goodman* v. *Boycott*, 2 B. & S. 1; 31 Law J. Q. B. 69.

(*f*) Bro. Abr. DETINUE, pl. 30, 45.

(*g*) *Freeman* v. *Birch*, 1 N. & M. 420; *Nicolls* v. *Bastard*, 2 C. M. & R. 660.

defeated by matter subsequent to the bailment or to the recognition of the title by the defendant (*h*). He may refuse to redeliver the goods to the bailor on the ground that they are the property of another person who has demanded and received them, or who has forbidden the bailee to part with the possession of them (*i*); but the bailee cannot, if the possession of the bailor was a lawful possession, and the bailment was not founded in fraud, of his own accord set up the *jus tertii* (*k*). He can set up the title of another only "if he defends upon the right and title and by the authority of that person" (*l*). But if the bailor was a trespasser or a thief in possessing himself of the goods, or the bailment was made with intent to defraud, the bailee may justify his refusal to deliver them up to the bailor, whether the true owner has or has not interposed to prevent delivery.

Where the plaintiff in an action for the detention of plate proved that he had pawned the plate with the defendant, and afterwards sought to redeem it, and tendered the amount due upon it, but the defendant refused to deliver it up, it was held that the defendant might, under a plea alleging that the plate was not the property of the plaintiff, show that the plaintiff had, prior to the deposit of the plate with the defendant, transferred it by a bill of sale to a purchaser, who, nevertheless, allowed the plaintiff to continue in possession of it; that the plate had been deposited with the defendant in fraud of such purchaser, and that the defendant detained the plate by the order and under the authority of the latter (*m*).

If the owner of goods has delivered them to a bailee to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of a conversion (*n*). In an action for a conversion of chattels, it was held by Lord Kenyon, that where the demand of the things for which the action is brought is not made by the owner who deposited them with the defendant, but by another person on his account, and the defendant refuses to deliver them, on the ground that he does not know whether the things belong to him or

(*h*) *Thorne* v. *Tilbury*, 3 H. & N. 534; 27 Law J. Exch. 407.

(*i*) *Shelbury* v. *Scotsford*, Yelv. 22: *Biddle* v. *Bond*, *ante*, p. 360

(*k*) *Armory* v. *Delamirie*, 1 Str. 505.

(*l*) Pollock, C. B., *Thorne* v. *Tilbury*, Blackburn, J., *Biddle* v. *Bond*, *ut sup.*; *Bourne* v. *Fosbrooke*, 34 Law J. C. P. 164.

(*m*) *Cheesman* v. *Exall*, 6 Exch. 344.

(*n*) *Lee* v. *Bayes*, 18 C. B. 607; 25 Law J. C. P. 249; *Europe & Austr. R. M. Co.* v. *R. M. St. P. Co.*, 30 Law J. C. P. 247; *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 618.

not, and therefore keeps them till that is ascertained, or that the person who applies is not properly empowered to receive them, or until he is satisfied by what authority he applies, that is not such a refusal as is evidence of a conversion (*o*). And if the defendant has a *bonâ fide* doubt as to the title of the claimant, it must be shown that reasonable time was given him for clearing up that doubt (*p*). But if he sets up the title of his bailor, and affirms him to be the owner, or gives an absolute, unqualified refusal to deliver up the chattels, there is evidence of a conversion (*q*). Where a pony-chaise was delivered to a workman to be painted, and the latter deposited it in the hands of a person who refused to deliver it up to the owner, unless the latter either produced the person who placed the chaise in his hands, or an order from him for its delivery, it was held that the owner was entitled to the possession of his property without doing either one or the other (*r*).

Joint and separate rights of action.—If a chattel has been deposited by two or more joint-owners of it in the hands of a bailee, who has agreed to keep it for them, it is not in the power of one of them to take it out of his hands without the consent of the others. If that were not so, each might demand the chattel, and have an action for its non-delivery, and so the bailee might be harassed with as many actions as there were joint-owners (*s*). But if the bailee thinks fit to deliver up the goods to one of the joint-bailors, a joint-action by all of them cannot afterwards be maintained against him, for the one who has got the goods cannot join with the others in suing for the non-delivery of them (*t*). If several joint-owners allow one of them to deal with their property, and place it in the hands of a bailee, the latter is accountable to the owner with whom he deals (*u*), "as if a charter be made to four, and one of them bails the charter to keep, he alone, without the others, may bring detinue; or all the owners may be joined as plaintiffs, except in the case of deposits of money in the hands of bankers" (*x*). Where two persons were severally entitled to separate portions of the contents of a box delivered by their agent to a railway company, to be carried for both of them, and the box was lost, it was held that they might sue jointly for damages (*y*).

Declarations against bailees for damage to chattels.—Where

(*o*) *Solomons* v. *Dawes*, 1 Esp. 82.

(*p*) *Pillot* v. *Wilkinson*, 32 Law J. Exch. 201; 34 *ibid.* 22.

(*q*) *Pillot* v. *Wilkinson*, *supra*; *Woodley* v. *Coventry*, 2 H. & C. 164.

(*r*) *Burton* v. *Baughan*, 6 C. & P. 674.

(*s*) *Attwood* v. *Ernest*, 13 C. B. 889; 22 Law J. C. P. 225.

(*t*) *Brandon* v. *Scott*, 7 Ell. & Bl. 237; 26 Law J. Q. B. 163.

(*u*) Martin, B., *Walshe* v. *Provan*, 8 Exch. 852.

(*x*) Thel. Dig. lib. ii., cap. 47, s. 8; *Broadbent* v. *Ledward*, 11 Ad. & E. 211.

(*y*) *Metcalfe* v. *Lond. & Brighton Ry. Co.*, 4 C. B. N. S. 319; 27 Law J. C. P. 333.

the plaintiff's declaration alleged that the defendant undertook, safely and securely, to raise up several hogsheads of brandy of the plaintiff then in a certain cellar, and to lay them down again in a certain other cellar, and that the defendant and his servants so negligently and carelessly put down the hogsheads in the said other cellar that, through want of care on their part, the casks were staved, and a great quantity of brandy was spilt, it was held that the declaration disclosed a good cause of action, though it did not allege that the defendant was a common porter, or that he was to have any reward for his pains (z).

Re-delivery of materials furnished by the employer.—If the bailor, before the work has been done, countermands the order for it, he has a right to the immediate return of the chattel, although, by his having countermanded the order, he may render himself liable to an action for a breach of contract (a). If the bailee by mistake, or in obedience to a forged order, returns the chattel to the wrong person, and the article is lost, he is responsible for the loss (b).

Contracts for the performance of work—Building contracts—Prevention of performance—Damages.—Where a contract has been entered into for the building of a house, and the owner refuses to permit the building to be completed, and prevents the workman from earning the stipulated remuneration, the measure of damages in respect of so much of the contract as remains unperformed is the difference between what the performance would have cost the plaintiff and the price which the defendant agreed to pay (c). And in all cases of prevention of performance, where the plaintiff has been deprived by the defendant of the benefit of the contract, the plaintiff is entitled to recover what he has lost by the act of the defendant (d).

When a contract for the performance of work and labour has not been fully carried out by the workman, but the employer has, and retains, the benefit of a part performance, and the contract is divisible and apportionable, or the plaintiff has been discharged from his liability to complete the portion unperformed, the measure of the damages is the residue of the full sum agreed to be paid, after deducting such an amount as will enable the defendant to get the contract completed and carried out according to the original intention of the contracting parties (e). If the plaintiff has contracted to do the work and supply materials for a fixed

(z) *Coggs* v. *Bernard*, 2 Ld. Raym. 909.

(a) *Lilley* v. *Barnsley*, 1 C. & K. 344.

(b) *Wilson* v. *Powis*. 11 Moore, 543; *Lubbock* v. *Inglis*, 1 Stark. 104.

(c) *Masterton* v. *Mayor, &c., Brooketyre*, ante, p. 402.

(d) *Planché* v. *Colburn*, 1 M. & Sc. 51; *Inchbald* v. *West, &c., Coffee Co.*, post. Discharge.

(e) *Ante*, pp. 392-402; *Cutler* v. *Close*, 5 C. & P. 339.

sum, and the defendant afterwards finds some of the materials, the defendant is entitled to deduct the fair value of his materials from the contract price (*f*). Where a judgment had been recovered by the plaintiff against a relation of the defendant, and the latter promised the plaintiff that, if he would forbear to issue execution upon the judgment, the defendant would erect and finish a substantial house, and cause a lease thereof to be granted to the plaintiff, and the plaintiff promised that such lease, when granted, should be in full satisfaction of the judgment, it was held that the measure of damages arising from the breach of the defendant's promise was the value of the house, if it had been erected, and of the lease thereof, and not the difference between the value of the judgment and the value of the house and lease (*g*).

SECTION II.

MASTER AND SERVANT.

Of contracts of hiring and service.—The contract of letting and hiring relates as frequently to human labour and skill, care, and attention, as to moveable and immoveable property, realty, and personalty; the labour and services of workmen and artificers being daily hired to be employed in domestic affairs, in the cultivation of land, in the building of houses, in the manufacture of materials furnished to be worked up, and upon chattels which have been bailed or delivered to the workman to be mended or repaired (*a*). In order to constitute a contract of hiring and service, there must be either an express or an implied mutual engagement binding one party to employ and remunerate, and the other to serve, for some determinate term or period (*ante*, p. 5). It has been said that, if the employer merely covenants to pay so long as the servant continues to serve, leaving it optional, either with the servant to serve, or with the employer to employ, there is no contract of hiring and service (*b*). But this decision has been doubted (*c*); and, if the servant binds himself to serve for some

(*f*) *Newton* v. *Forster*, 12 M. & W. 772.

(*g*) *Strutt* v. *Farlar*, 16 M. & W. 249; 16 L. J. Ex. 84.

(*a*) *Ostendit definitio, duo esse genera locationis, rerum unam, alteram operarum seu factorum*; Vin. Com. lib. 3, tit. 25, 757; Pandect. Pothier, lib. 19, tit. 2, Art. 1.

(*b*) *Williamson* v. *Taylor*, 5 Q. B. 175.

(*c*) *Emmens* v. *Elderton*, 4 H. L. C. 624; 13 C. B. 495; *Whittle* v. *Frankland*, 2 B. & S. 49; 31 L. J. M. C. 81.

determinate term, and the employer expressly or impliedly covenants or promises to retain the servant in his service for the term, there is a contract of hiring and service.

Where the plaintiff covenanted that his son should serve and continue with the defendant as his assistant in the art of a surgeon-dentist for five years, and should execute and perform such work and service in the art as the defendant should direct, and the defendant covenanted with the plaintiff that he would, during the term of five years, in case the son should well and faithfully serve, &c., pay him certain weekly wages, it was held that, as there was no express covenant on the part of the defendant to employ or retain the son in the defendant's service for five years, the defendant was at liberty to dismiss him whenever he pleased, and discontinue the payment of the weekly wages (*d*). But this decision is not reconcileable with other authorities; and it is apprehended that, wherever one party covenants to serve for a particular period, and the other covenants to pay him a salary or wages for the service during the term, there is an implied covenant on the part of the latter to retain the servant in his service during the term, provided the latter serves faithfully, and is guilty of no misconduct warranting a dismissal. Where it was agreed between the plaintiff and a joint-stock company that the plaintiff should be the permanent attorney of the company, and should receive and accept a salary of 100*l*. a-year in lieu of his annual bill of costs, and should for such salary advise and act for the company on all occasions, it was held that there was an implied contract on the part of the company to retain the attorney in their service for one year at least, and pay him the salary he had agreed to accept, but that the word "permanent" did not confer any durable appointment beyond the year, so as to prevent the employer from withdrawing the retainer (*e*).

Whenever one party agrees to retain or hire, and another agrees to serve for a certain term, at a specified salary, there is a contract of hiring and service, although the servant may never be called upon or required to do any work. There are many cases of hiring and employment of parties to serve in some particular character or capacity where the servant is bound to serve if called upon, and is entitled to his salary by holding himself in readiness to serve, although his services are not called into requisition by the employer. In these cases there is a continuous hiring or retainer; and the readiness and willingness to serve on the part of the servant are equivalent to actual service.

(*d*) *Dunn* v. *Sayles*, 5 Q. B. 685.

(*e*) *Emmens* v. *Elderton*, 13 C. B. 495; 4 H. L. C. 645; *Reg.* v. *Welch*, 2 Ell. & Bl. 362; *Rust* v. *Nottidge*, 1 Ell. & Bl. 99; *Hartley* v. *Cummings*, 17 L. J. C. P. 84; *Pilkington* v. *Scott*, 15 M. & W 660; *M'Intyre* v. *Belcher*, 32 L. J. C. P. 254.

Authentication and proof of the contract.—A contract of hiring and service need not be authenticated by writing, unless the hiring exceeds a year in duration (*ante*, p. 170); and, if reduced into writing, it need not be stamped, if it is a contract for the hire of "labourers, artificers, manufacturers, or menial servants," and not a contract of apprenticeship (*post*, p. 453). In the absence of an express contract between the parties, a hiring may be presumed from the mere fact of the service, unless the service has been with near relations. If a man, for example, serves a stranger in the capacity of a clerk, or of a menial servant, or servant in husbandry, for a continued period, the law presumes that the service has been rendered in fulfilment of a contract of hiring and service; and, if the party has served without anything being said as to wages, the law presumes that there was a contract for customary and reasonable wages (*f*). But, if the service has been with the parent or uncle, or other near relation of the party serving, a hiring cannot be implied or presumed from it, but an express hiring must be proved in order to support a claim for wages; for the law regards services rendered by near relations to one another as gratuitous acts of kindness and charity, and does not presume that they are to be paid for, unless there is an express contract to that effect (*g*). And, if a poor person is taken out of charity and provided with food, lodging, clothes, and necessaries, and set to work, no contract of hiring and service is implied therefrom, however long the party may continue to serve (*h*).

Yearly hirings—Domestic servants.—When the employment of a servant is of a permanent nature, and annual wages are reserved, the hiring is a yearly hiring; and, when the servant is not a household or domestic servant, the hiring cannot be put an end to by either party without the consent of the other, before the termination of the current year (*i*). A hiring of a servant in husbandry, for example, is an indefeasible yearly hiring, analogous to a yearly tenancy. At the end of each year a new contract arises to serve for the year commencing, which will continue as long as the parties may please, and can only be terminated at the end of the current year, unless the servant is guilty of misconduct (*k*). A general hiring of a clerk, foreman, journeyman, or traveller, at annual wages, "with board in the house," is, in general, a yearly hiring, which can only be put an end to by consent, or at

(*f*) Lord Ellenborough, C. J., 15 East, 454; *Phillips* v. *Jones*, 1 Ad. & E. 333.

(*g*) *Davies* v. *Davies*, 9 C. & P. 87; *Gregory Stoke* v. *Pitminster*, 2 Bott. P. L. C. 206, case 269; *R.* v. *Sow*, 1 B. & Ald. 181; *R.* v. *St. Mary Guildford*, 2 Bott. 209, c. 273; Cald. 521; *R.* v. *Stokesley*, 6 T. R. 757.

(*h*) *R.* v. *Weyhill*, 1 W. Bl. 206; 2 Bott. 207, case 271.

(*i*) *Emmens* v. *Elderton*, *ante*, p. 435.

(*k*) *R.* v. *Lyth*, 5 T. R. 337; 3 *ib.* 76.

the expiration of the current year (*l*); and so also is a general hiring of a governess at annual wages, with board in the house (*m*); but the duration of the term of hiring will be regulated and controlled by custom and usage and the surrounding circumstances of the case (*n*). A general hiring of postillions and ostlers, upon the terms that they are to receive board and lodging in the house, and the vails or perquisites of the stables in lieu of wages, is a yearly hiring (*o*); and so also is a general hiring of a warehouseman, "the employer engaging to pay 12*l*. 10*s*. per month for the first year, and advance 10*l*. per annum until the salary should be 180*l*." (*p*); also a general hiring of editors, sub-editors, reporters, and other persons regularly employed upon old-standing and permanently-established newspapers and periodicals (*q*). Reservations of quarterly, monthly, or weekly wages are not inconsistent with a yearly hiring. "Whether the wages be to be paid by the week or the year cannot make any alteration in the duration of the service, if the contract were for a year" (*r*); but, if there has been no continued service for a lengthened period, and there is nothing in the nature of the employment, and no particular custom or usage leading necessarily to the conclusion that the hiring was for a year, the payment of weekly or monthly wages raises a presumption in favour of a weekly or monthly hiring (*s*). A "hiring for twelve months certain, and to continue from time to time until three months' notice in writing be given by either party to determine the same," is a hiring for a year certain only; and either party is at liberty to put an end to it at the expiration of the first year, by giving three months' previous notice (*t*). It has also been held that an agreement "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving the other a three months' notice," can be determined at the end of the twelfth month without notice (*u*).

Indefeasible and defeasible yearly hirings—Month's warning or a month's wages.—If by the custom or usage of trade the hiring may be put an end to and the contract dissolved, by notice given by either of the parties, the hiring is a conditional or

(*l*) *Beeston* v. *Collyer*, 12 Moore, 552; *R.* v. *Batheaston*, Burn. Sett. Cas 823, No. 257; *Turner* v. *Robinson*, 5 B. & Ad. 789; 2 N. & M. 829; *Davis* v. *Marshall*, 9 W. R. 520.

(*m*) *Todd* v. *Kerrich*, 8 Exch. 151; 22 L. J. Ex. 1.

(*n*) *Fairman* v. *Oakford*, 5 H. & N. 636; 29 L. J. Ex. 459; *Green* v. *Wright*, 1 C. P. D. 591.

(*o*) Burr. Set. Cas. 759, No. 236; 2 Bott. 229, 230, pl. 294, 297.

(*p*) *Fawcett* v. *Cash*. 5 B. & Ad. 908.

(*q*) *Holcroft* v. *Barber*, 1 Car. & Kirw. 4; *Baxter* v. *Nurse*, *ib.* 10; *Williams* v. *Byrne*, 2 N. & P. 139.

(*r*) Kenyon, C. J., 4 T. R. 246: *R.* v. *Seaton*, Cald. 440.

(*s*) *R.* v *Pucklechurch*, 5 East, 384; *Baxter* v. *Nurse*, 7 Sc. N. R. 801; 6 M. & Gr. 935.

(*t*) *Brown* v. *Symons*, 8 C. B. N. S. 208; 29 L. J. C. P. 251.

(*u*) *Langton* v. *Carleton*, L. R. 9 Ex. 57.

defeasible yearly hiring, determinable by giving the customary notice at any time during the term. By the custom of particular trades a general hiring of a commercial traveller is a hiring for a year, subject to an implied understanding that either party may determine the engagement by giving three months' notice (*x*). A general hiring of menial or household servants, such as cooks, scullions, housemaids, footmen, butlers, coachmen, grooms, where no time is mentioned for the duration of the service, is a hiring for a year, and so on from year to year, defeasible by custom and usage, at the option of either of the parties, on giving a month's warning, or on the part of the master by paying or tendering a month's wages. If the contract is put into writing, the customary power of defeasance is impliedly annexed to the express terms of the written agreement, unless the custom is excluded by express words (*y*). A servant may be a menial servant, and as such clothed with this implied power of defeasance, although he does not reside within the walls of the master's house. This has been held to be the case with a head gardener hired for a year at 100*l.* wages, with a house in the master's grounds, and the privilege of taking in apprentices for a year at 15*l.* premium (*z*); also with a huntsman engaged at a salary of 100*l.* a year, with a house to live in and perquisites (*a*).

When a power of defeasance is vested in the parties, either by custom or special agreement, or the contract is made defeasible upon the happening of a given event, the hiring is nevertheless a yearly hiring; so that, if the power of defeasance is not exercised, and the contract is permitted to run on, and the service to continue for a year, there is a year's hiring and service, which will gain a settlement under the poor laws (*b*). "It is a yearly hiring, notwithstanding the power of determining it, if that is not exercised before the expiration of the year. The contingency not having happened, and the contract not having been defeated during the year, it enures after the year's service as a yearly hiring" (*c*). A servant may engage himself to serve for a certain determinate period, but may give the employer the option of determining the contract, and dismissing him at any period of the service. Where the engagement of a clerk or a superintendent was to be for three years, "at the option" of the employer, at a yearly salary, it was

(*x*) *Metzner* v. *Bolton*, 9 Exch. 518; 23 L. J. Ex. 130.

(*y*) *Johnson* v. *Blenkensop*, 5 Jur. 870.

(*z*) *Nowlan* v. *Ablett*, 2 C. M. & R. 57.

(*a*) *Nicoll* v. *Greaves*, 17 C. B. N. S. 27; 33 L. J. C. P. 259.

(*b*) *R.* v. *Atherton*, Burr. Set. Cas. 203, No. 71; *R.* v. *Birdbrooke*, 4 T. R. 246; *R.* v. *Farleigh Wallop*, 1 B. & Ad. 340, 342; *R.* v. *New Windsor*, Burr. Set. Cas. 22, No. 7; *R.* v. *Gt. Yarmouth*, 5 M. & S. 114; *R.* v. *Northwold*, 2 D. & R. 792.

(*c*) *R.* v. *Sandhurst*, 7 B. & C. 562; 1 M. & R. 101; *R.* v. *Byker*, 3 D. & R. 336; 2 B. & C. 119; *R.* v. *Lidney*, Burr. Set. Cas. 1.

held that this was a contract binding the servant to serve three years, and giving the employer the option of determining the contract at the end of each year by a proper notice, but not of dismissing the servant at any time; that the option to be exercised by the employer was whether the servant was to remain for one, two, or three years, and that, if he was dismissed in the middle of a current year, he was entitled to compensation (*d*).

Hiring by the month and week.—Where a journeyman miller was hired "at monthly wages, with liberty to depart at a month's wages or a month's warning," the hiring was held to be a hiring by the month (*e*); but, when the wages are reserved weekly with a proviso for a month's warning, the presumption is in favour of a conditional and defeasible yearly hiring. If there be anything in the contract to show that the hiring was intended to be for a year, then a reservation of weekly wages will not control that hiring. But, if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring (*f*). "The mere arrangement," observes Bayley, J., "that the wages shall be at one rate in the summer and at another in the winter does not show that the parties contemplated a service to endure through the summer and winter, and therefore that they intended a hiring for a year; but shows only that they intended that, if the servant, being hired at weekly wages, should remain till the summer, he should then have so much per week. The true meaning of such an arrangement is merely this: that the servant's wages as a weekly servant are to be regulated by the seasons" (*g*). But, if the nature of the employment or the terms of the contract are inconsistent with a weekly hiring, the reservation of weekly wages will be regarded merely as a mode of payment, and not as an indication of the duration of the contract (*h*). Thus, the presumption of a weekly hiring resulting from a reservation of weekly wages is rebutted by a stipulation for a fortnight's or a month's notice to quit (*i*).

Service at will.—A boy was employed to work "for meat, drink, and clothes, as long as he had a mind to stop," and served for two years upon these terms; and the service was held to be a mere

(*d*) *Down* v. *Pinto*, 9 Exch. 327; 23 L. J. Ex. 103.

(*e*) *R.* v. *Clare*, 2 Bott. 229, pl. 295.

(*f*) Ellenborough, C. J., *R.* v. *Dodderhill*, 3 M. & S. 245; Burr. Sett. Cas. 280, No. 98; *R.* v. *Pucklechurch*, 5 East, 384; *R.* v. *Hanbury*, 2 East, 425; *R.* v. *Mitcham*, 12 East, 352; Ashurst, J., *R.* v. *Newton Toney*, 2 T. R. 455; *R.* v. *Odiham*, *ib.* 622; *Baxter* v. *Nurse*, 7 Sc. N. R. 801; 6 M. & Gr. 935; *R.* v. *Elstack*, 2 Bott. 227, pl. 292; *R.* v. *Dedham*, 2 Bott. 227, pl. 292; *R.* v. *Warminster*, 9 D. & R. 70; *Evans* v. *Roe*, L. R. 7 C. P. 138.

(*g*) *R.* v. *Rolvenden*, 1 M. & R. 691; *R.* v. *Dodderhill*, 3 M. & S. 243; *R.* v. *Lambeth*, 4 *ib.* 315.

(*h*) *Davis* v. *Marshall*, 9 W. R. 520.

(*i*) *R.* v. *Hampreston*, 5 T. R. 208; *R.* v. *St. Andrew, Pershore*, 8 B. & C. 679; *R.* v. *Birdbrooke*, 4 T. R. 246; *R.* v. *G. Yarmouth*, 5 M. & S. 117.

service at will (*k*) So, where an assistant workman was "to come and go when he liked," and an ostler and his master were "to be at liberty to separate when they pleased," the service was held to be a service at will (*l*) In these cases there is in truth no contract of hiring at all (*m*) The transaction amounts merely to an authority to serve upon certain terms If the work is actually performed and accepted, the law raises an implied promise of remuneration from the employer to the workman; but the former is not bound to provide the work, nor is the latter bound to execute it

Rights and liabilities of master and servant.—It is the first duty of the master, after the contract of hiring and service has been entered into, to take the servant into his employ, and enable him to earn the hire or reward agreed to be paid, and, if he neglects so to do, he renders himself liable forthwith to an action for a breach of contract "The master is bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief, but the law does not imply, from the mere relation of master and servant, an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself" (*n*) If the servant sustains injury in the course of his employment from the negligence of the master, the latter will be responsible in damages (*o*), although there is no implied agreement by the master in an ordinary contract of hiring and service not to expose the servant to extraordinary risks in the course of his employment (*p*), but the master is not liable for surgical attendance and medicine rendered to a servant who has been injured in the execution of his master's service, unless the surgeon has been called in by the master's orders (*q*), nor for injuries sustained from the unseaworthiness of a vessel in which the servant is employed (*r*), nor for injuries which one servant has sustained through the negligence of another servant of the same employer (as we shall presently see), provided the master provides proper machinery (*s*), and takes care that his servants are persons of

(*k*) *R* v *Christ's Parish, York*, 3 B & C 459, 5 D & R 314

(*l*) *R* v *Gt Bowden*, 7 B & C 249

(*m*) *R* v *St Matthews, Ipswich*, 3 T R 449

(*n*) *Riley* v *Baxendale*, 30 L J Ex 87, *Priestly* v *Fowler*, 3 M & W 5, *Paterson* v *Wallace*, 1 Macq H L C 748, *Davies* v *England*, 33 L J Q B 321 as to injuries from unfenced machinery, see *Holmes* v *Clarke*, 30 L J Ex 135 31 L J Ex 356, 7 H & N 937

(*o*) *Ashworth* v *Stanwix*, 30 L J Q B 183 *Clarke* v *Holmes*, 7 H & N 937 31 L J Ex 356, *Weems* v *Mathieson*, 4 Macq H L C 215, *Mellors* v *Shaw*, 1 B & S 437, 30 L J Q B 333

(*p*) *Riley* v *Baxendale*, 6 H & N. 445 30 L J Ex 87

(*q*) *Wennall* v *Adney*, 3 B & P 247, *Cooper* v *Phillips*, 4 C & P 581

(*r*) *Couch* v *Steel*, 23 L J Q B 121

(*s*) *Searle* v *Lindsay*, 11 C B N S 429, 31 L J C P 106

competent skill and ordinary carefulness (*t*); for a servant, when he engages to serve a master, undertakes as between him and his master to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in "the discharge of his duty as servant of him who is the common master of both" (*u*).

The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, he is just as likely to be acquainted with the probability and extent of it as the master. The master, therefore, is not responsible for injuries sustained by his servant through the viciousness of the horse which the servant is employed to groom, or through the breaking down of a van or carriage in which the servant is directed by the master to ride or drive, or from the employer's keeping an insufficient staff of servants for the performance of the work he has to do (*x*), or through the use of dangerous machinery, with the use of which the servant is, or professes to be, acquainted, and which he has voluntarily undertaken to use (*y*), or for the dangers attendant upon the mounting of scaffolds, or unfinished staircases and landings, which the workman has voluntarily undertaken to mount, with as much knowledge of the attendant risk as the person who employs him (*z*).

Where the master's coach broke down through the negligence of a coach-maker who had contracted with the master to furnish the latter with sound roadworthy coaches, and repair them, and keep them in good working order, and the coachman was mutilated and maimed for life, it was held that he had no remedy for the injury. The law does not permit him to recover damages from his own master and employer. Neither can he sue the coach-maker, whose negligence occasioned the injury. "It is no doubt a hardship upon the plaintiff," observes Rolfe, B., "to be without a remedy, but by that consideration we ought not to be

(*t*) *Potter* v. *Faulkner*, 1 B. & S. 800, 31 L. J. Q. B. 30, *Senior* v. *Ward*, 1 El. & El. 385.

(*u*) *Hutchinson* v. *York, Newc. & Berw. Ry. Co.*, 5 Exch. 343, 19 L. J. Ex. 296, *Wigmore* v. *Jay*, *ib.* 300; 5 Exch. 354, *Seymour* v. *Maddox*, 20 L. J. Q. B. 327, 16 Q. B. 326; *Lovegrove* v. *L. B. & S. C. Ry. Co.*, 16 C. B. N. S. 669; 33 L. J. C. P. 329; *Waller* v. *The S. E. Ry. Co.*, 3 H. & C. 102; 32 L. J. Ex. 205, *Murphy* v. *Caralli*, 3 H. & C. 462; 34 L. J. Ex. 14; *Tunney* v. *Midland Ry. Co.*, L. R. 1 C. P. 291; as to who are fellow servants, see *Hall* v. *Johnson*, 3 H. & C. 589, 34 L. J. Ex. 222, N. 32; *Feltham* v. *England*, L. R. 2 Q. B. 33; 36 L. J. Q. B. 14, *Warburton* v. *Great Western Ry. Co.*, L. R. 2 Ex. 30; 36 L. J. Ex. 9.

(*x*) *Skipp* v. *East. Co. Ry. Co.*, 9 Exch. 223.

(*y*) *Dynen* v. *Leach*, 26 Law J. Exch. 221.

(*z*) *Assop* v. *Yates*, 2 H. & N. 770; 27 Law J. Exch. 156; *Griffiths* v. *Gidlow*, *ib.* 404; *Potts* v. *Plunkett*, 9 Ir. C. L. R. 290.

influenced" (*a*). "There would be no end of actions if we were to hold that a person having once done a piece of work carelessly, should, independently of honesty of purpose" (or contract), "be fixed with liability in this way by reason of bad materials or insufficient fastening" (*b*).

If a man employs ignorant, inexperienced workmen in dangerous employments, and exposes them improperly to risks, of which he is cognizant, and which are not known to the ignorant workman, he will be liable for the consequences of his misconduct (*c*). For personal negligence of the master, whereby injury is occasioned to the servant, the master will be liable (*d*). And where rules are framed by employers for the purpose of regulating the management and exercise of a dangerous employment, and these rules are carelessly or improperly framed, so as to cause dangers and risks, which might be guarded against and prevented by proper rules carefully prepared, the employers will be responsible for the consequences of their negligence (*e*). Where statutory regulations exist for the management of a colliery (*f*), and securing the safety of the workmen, and these rules are culpably neglected with the knowledge of the owner of the mine, the latter will be responsible for the consequences of his neglect of duty, unless the person injured has brought the mischief upon himself by his own negligence (*g*). And the same rules apply where machinery is required by Act of Parliament to be protected, and the master will be responsible for the want of such protection, unless the accident has been caused by the negligence of the servant himself (*h*). Where the dangerous nature of the employment is obvious the servant must necessarily be taken to have known it; but even if it be known to the servant yet that does not make him a "volunteer" so as to exonerate his masters from their liability for breach of a statutory duty to protect the servant from the dangerous thing (*hh*). Where the Employers' Liability Act, 1880, applies, the law, as above stated, will be modified. See provisions of the Act, *post*.

If a rule established for securing the safety of workmen in a dangerous employment is habitually violated, to the knowledge of

(*a*) *Winterbottom* v. *Wright*, 10 M. & W. 115; *Priestley* v. *Fowler*, 3 M. & W. 6; *Riley* v. *Baxendale*, 6 H. & N. 455; 30 Law J. Exch. 87; *Potts* v. *Port Carlisle, &c., Ry. Co.*, 2 Law T. R. N. S. 283; *Heaven* v. *Pender*, 9 Q. B. D. 302.

(*b*) *Per* Willes, J., *Collis* v. *Selden*, L. R. 3 C. P. 498.

(*c*) *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 295; *Mellors* v. *Shaw*, 30 Law J. C. P. 333; *Weems* v. *Mathieson*, 4 Macq. H. L. C. 215; *Farrant* v. *Barnes*, 31 Law J. C. P. 139.

(*d*) *Ashworth* v. *Stanwix*, 30 Law J. Q. B. 183.

(*e*) *Vose* v. *Lanc. & York. Ry. Co.*, 2 H. & N. 728; 35 & 36 Vict. c. 76.

(*f*) As to ventilation of collieries, see *Brough* v. *Homfray*, L. R. 3 Q. B. 771; as to statutory regulations under the Factory Acts, see 41 & 42 Vict. c. 16.

(*g*) *Caswell* v. *Worth*, 5 Ell. & Bl. 855; *Senior* v. *Ward*, 1 Ell. & Ell. 385; 28 Law J. Q. B. 139.

(*h*) *Post*, p. 444.

(*hh*) *Britton* v. *G. W. Cotton Co.*, L. R. 7 Ex. 130.

the workman himself, the latter has no ground to recover damages from the employer for injuries sustained from the non-observance of the rule (*i*).

A declaration alleging that the plaintiff was the servant of the defendant, and that the defendant ordered the plaintiff to ascend and use certain scaffolding, &c., well knowing it to be dangerous and unfit for use, and that the plaintiff, in obedience to the order of the defendant, used the scaffolding, &c., believing it to be safe and fit for use, and not knowing the contrary, and not having the same means that the plaintiff had of forming a correct opinion upon its sufficiency and safety, and that the scaffolding, &c., by reason of its being unsafe and unfit for use, gave way with the plaintiff upon it, and precipitated the plaintiff upon the ground, &c., discloses a good cause of action (*k*).

If hidden and secret dangers exist upon the master's premises, known to him and unknown to his workmen, it is his duty to disclose them to the latter, that they may take precautions against them (*l*). If a master was to order his servant to take a lighted candle amongst packages known by him, but not known by the servant, to contain gunpowder, the master would be responsible for any injury sustained by the latter from the unknown danger and unexpected risk to which he had been exposed, So if a servant be employed to cut up diseased cattle (*m*). It is otherwise if the servant accepts of the employment knowing of the risk he runs (see *infra*). If the danger is unknown to the master, and there is no negligence on his part, he cannot be made responsible in damages (*n*); as where a floor of a warehouse gave way and injured a workman who was thereon (*o*). So if a railway company employs workmen upon its tunnels, sidings, or stations, it is guilty of negligence if it conducts its traffic so as to expose the workmen to unexpected and unforeseen dangers, which they had no means of guarding against (*p*).

Exemption of the master from liability when the danger is known to the servant.—But the master is not responsible for the dangerous state of his premises, if those dangers are known to the servant, and the latter has accepted the employment knowing of the attendant risks, and having an opportunity of guarding against them by his own vigilance and care. Where the plaintiff alleged

(*i*) *Senior* v. *Ward*, 1 El. & El. 385; 28 L. J. Q. B. 139

(*k*) *Williams* v. *Clough*, 3 H. & N. 258; 27 L. J. Ex. 325.

(*l*) *Williams* v. *Clough*, 3 H. & N. 258; 27 Law J. Exch. 325; *Mellors* v. *Shaw*, 1 B. & S. 444; *Ashworth* v. *Stanwix*, 30 Law J. Q. B. 183.

(*m*) *Davies* v. *England*, 33 L. J. Q. B. 321.

(*n*) *Potts* v. *Port Carlisle, &c. Co.*, 2 Law T R. N. S. 283; 8 W. R. 524.

(*o*) *Brown* v. *Accrington Cotton Co.*, 34 L. J Exch. 208.

(*p*) *Vose* v. *Lanc. & York. Ry. Co.*, 2 H. & N. 728; 27 Law J. Exch. 249.

that he had been hired by the defendant to perform at the defendant's theatre, and that on part of the stage there was a hole in the floor, along which the plaintiff had to pass in the discharge of his duty as a performer, and that it was the duty of the defendant to light the floor sufficiently, so as to prevent accidents to those who passed along it, it was held that no such duty was cast upon the defendant. "A person," observes Erle, J., "must make his own choice whether he will accept employment upon premises in this condition, and if he do accept such employment, he must also make his own choice whether he will pass along the floor in the dark, or carry a light. If he sustains an injury in consequence of the premises not being lighted, he has no right of action against the master, who has not contracted that the floor shall be lighted." If the servant wishes the premises to be kept in any particular state with respect to lighting and fencing, he must provide for it by express contract (q)

Where the workman is employed in the use of dangerous machinery furnished by the employer, and is, or professes to be, acquainted with the use of the machinery, and the care necessary to be taken to guard against accident, and, notwithstanding this, sustains injury from his own want of care and caution in the use of it, he has, of course, no ground of action against the employer (r). But if an Act of Parliament requires machinery to be fenced, and it is left unfenced, and the servant complains, and the master induces him to continue his work by telling him that proper protection shall be afforded, the master takes upon himself the responsibility of any accident that may occur (s).

Injuries to workmen from defective hoisting-tackle in mines and insecure scaffolding and ladders.—It has been held, in a Scotch case in the House of Lords, that the owner of a mine is bound to exercise ordinary care and vigilance to keep the shaft of the mine in a safe state, and the machinery for lifting people from the mine, and lowering them into it, in secure condition (t). And it is in all cases the master's duty to be careful that his workman be not induced to work under the notion that the tackle, scaffolding, or rope with which he works is secure, when the master knows, or has reasonable ground for believing, that it is unsafe and dangerous. If he interferes in the conduct and management of the work himself, he is bound to select sound and safe materials; and if he

(q) *Seymour* v. *Maddox*, 16 Q B. 332; *Bolch* v *Smith*, 7 H. & N. 736; 31 Law J. Q. B. 201, *Robertson* v *Adamson*, 24 Sc. Sess. Cas. 1231; *Potts* v. *Plunkett*, 9 Ir. C. L R 290.

(r) *Dynen* v. *Leach*, 26 Law J Exch. 221, *Barton's Hill Coal Co.* v. *Reid*, 3 Macq 294; see *Watling* v. *Oastler*, L. R 6 Exch. 73.

(s) *Holmes* v. *Clarke*, 30 Law J. Exch, 135; 31 *ib.* 356; *Weems* v. *Mathieson*. 4 Macq H. L. C. 215. See also *Britton* v. *G. W. Cotton Co*, *ante*, p. 442.

(t) *Brydon* v. *Stewart*, 2 Macq. 34.

knowingly allows rotten timber, rotten poles, or rotten ropes to be used in the construction of a scaffold, and injury is sustained therefrom by his servants or workmen, he will be responsible in damages (*u*). But if he does not in any way interfere himself, and employs a competent foreman to superintend the work, and select the materials, and the foreman selects unsound and unsafe materials, or knows that those he has selected have become unsafe, which cause injury to the workmen working under the foreman's directions, the master is not responsible, as the default is not in him, but in the foreman and fellow-servant of the injured workman, and the case then ranges itself with that class of cases where it has been held, that the master is not responsible for injuries to one fellow-servant caused by the negligence of another fellow-servant in his employ (*x*).

Injuries to one fellow-servant from the negligence of another fellow-servant.—Where several servants are employed by the same master in one common employment, the master is not responsible for injury resulting to one of them from the negligence of another, provided the master has taken due care not to expose his servant to unreasonable risks (*y*), and has been guilty of no want of care in the selection of proper servants (*z*). The principle laid down is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service; and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both (*a*), and when the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. Thus it has been held that a railway company is not responsible for an injury occasioned to one of their own servants by a collision on their railway, caused by the negligence of another of their servants, in respect of which injury they would undoubtedly have been liable if the person injured had been a stranger travelling as a passenger for hire (*b*). But the servants

(*u*) *Roberts* v. *Smith*, 26 Law J. Exch. 319; 2 H. & N. 213; *Senior* v. *Ward*, 28 Law J. Q. B. 139; *Mellors* v. *Shaw*, 1 B. & S. 444.

(*x*) *Wigmore* v. *Jay*, 5 Exch. 358, *post*, ch. V.; *Williams* v. *Clough*, 3 H. & N. 258; 27 Law J. Exch. 325; *Griffiths* v. *Gidlow*, *ib.* 404; *Farwell* v. *Boston, &c. Ry. Co.*, 3 Macq. 316; *Ormond* v. *Holland*, Ell. Bl. & Ell. 105; *Scott* v. *Craig*, 24 Sc. Sess. Cas. 789; *Searle* v. *Lindsay*, 11 C. B. N. S. 429; 31 Law J. C. P. 106; *Gallagher* v. *Piper*, 33 L. J. C. P. 329; *Feltham* v. *England*, L. R. 2 Q. B. 33. See, however, Employers' Liability Act, *infra*.

(*y*) *Hutchinson* v. *York Ry. Co.*, 5 Exch. 353.

(*z*) *Tarrant* v. *Webb*, 18 C. B. 805; see *Wilson* v. *Merry*, L. R. 1 Scotch & Div. App. 326.

(*a*) See *Morgan* v. *Vale of Neath Ry. Co.*, 33 L. J. Q. B. 260; *S. C.*, in error, L. R. 1 Q. B. 149.

(*b*) *M'Enery* v. *Waterford*, 8 Ir. C. L. R. 312; *Tunney* v. *Midland Ry. Co.*, L. R. 1 C. P. 291, in which case the plaintiff, a labourer, was being carried on

must be fellow-servants, engaged in a common service (c); for if a farmer's servant, delivering corn at the warehouse of a corn merchant, is injured by the negligence of the corn merchant's servant in taking in the sacks, the corn merchant would be answerable for the injury (d). And it is not enough that the servant injured, and the servant causing the injury, should be servants of the same master; they must be employed in the same work: for if a gentleman's coachman was to drive over his gamekeeper, the master would be just as responsible as if the coachman had driven over a stranger (e). Nor is it sufficient that they are temporarily subject to the same superintendent, if they are not in fact the servants of the same master (f). If a fellow-workman in a mine is also a co-proprietor in the mine, and therefore one of the plaintiff's masters, the common master is then responsible for injury caused by the negligence of such fellow-workman (g). But a certificated manager of a mine is a fellow-servant with the miners (h). A foreman is a servant, as much as the other servants, whose work he superintends (hh). A sub-contractor and his servants engaged in doing the common work of a particular contract, under a contractor, are all fellow-servants, engaged in one common employment, and they all are held to undertake, as between themselves and the contractor, to run all the ordinary known risks of the service, including the risk of negligence of the other servants (i). So a carpenter in the service of a railway company cannot sue the company for the negligence of a porter in their employ (k).

There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from a negligence of one is so much a natural and necessary consequence of the employment of which the other accepts that it must be included in the risks which are considered in his wages. Thus whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing the traffic is one of the risks necessarily and naturally incident to such an employment, and is within the rule (l).

the line, in pursuance of his contract of service with the company; *Hando* v. *Lond. Chat. & Dover Ry.* L. R. 2 Q. B. 439, n., *acc.*

(c) *Lovegrove* v. *Lond. & Brighton Ry.*, 33 L. J. C. P. 329.

(d) *Abraham* v. *Reynolds*, 5 H. & N. 149; *Waller* v. *S. E. Ry. Co.*, 32 Law J. Exch. 205.

(e) Ld. Cranworth, *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 294, 307.

(f) *Warburton* v. *Gt. West. Ry.*, L. R. 2 Exch. 30.

(g) *Ashworth* v. *Stanwix*, 30 Law J. Q. B. 183.

(h) *Howells* v. *Landore Steel Co.*, L. R. 10 Q. B. 62.

(hh) See *Wilson* v. *Merry*, *ante*, p. 445.

(i) *Wiggett* v. *Fox*, 11 Exch. 832; 25 Law J. Exch. 193.

(k) *Morgan* v. *Vale of Neath Ry.*, *sup.*

(l) *Morgan* v. *Vale of Neath Ry. Co.*, L. R. 1 Q. B. 149; 5 B. & S. 580; 33 L. J. Q. B. 265.

This must now be understood subject to the Employer's Liability Act, 1880 (*m*), which renders the masters in some cases liable for injuries caused by defects or by the negligence of a workman having superintendence. The amount of compensation recoverable is limited (*n*), and the action is to be brought in the first instance in the County Court (*o*), and notice of the injury given in writing (*p*).

Injuries to volunteers who assist gratuitously in work of a dangerous nature.—If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and the volunteer gets injured through the negligence of one of the servants, the employer is not responsible for the injury; for a person, by volunteering his services, cannot have any greater rights, or impose any greater duties on the employer, than would have existed if he had been a hired servant (*q*).

Duties of the servant.—Every servant, on the other hand, impliedly undertakes to obey the just and reasonable commands of the master, and to be careful, diligent, and industrious in the performance of the work intrusted to him to execute. A servant who professes to be capable of undertaking an office of skill impliedly represents himself to be possessed of the skill requisite for the due discharge of the functions of the office; and, if he does not possess that skill, or if, possessing it, he fails to exercise it, he is responsible for a breach of contract. A servant, in the service of a tradesman, impliedly promises to do no act knowingly and wilfully which may injure his master's trade or undermine his business. He must not attempt to draw away his master's customers; but there is no law which prevents him from soliciting prospective custom from them at some future period when he hopes to be able to set up in business for himself (*r*). His possession of the master's property is, as we have already seen, the master's possession. He has in contemplation of law the mere custody of it, so that, if he is provided with a house or a lodging by the master, he may be turned out of it at any moment without any notice to quit (*s*).

Indemnification of the master by the servant.—If damages have been recovered from the master by reason of the servant's negligence in doing the master's work, or in executing his orders,

(*m*) 43 & 44 Vict. c. 42.

(*n*) S. 3.

(*o*) S. 6.

(*p*) S. 4; see *Moyle* v. *Jenkins*, 8 Q. B. D. 112; *Keen* v. *Millwall Co.*, 8 Q. B. D. 482; *Stone* v. *Hyde*, 9 Q. B. D. 76; *Clarkson* v. *Musgrave*, 9 Q. B. D. 386. As to who is in charge of "a train upon a railway," see *Cox* v. *Gt. West. Ry. Co.*, 9 Q. B. D. 106. As to workman contracting himself out of the Act, see *Griffiths* v. *Earl Dudley*, *post*, p. 1138.

(*q*) *Degg* v. *Mid. Ry. Co.*, 1 H. & N. 773; 26 L. J. Exch. 173; *Potter* v. *Faulkner*, 1 B. & S. 800; 31 Law J. Q. B. 30.

(*r*) *Nichol* v. *Martin*, 2 Esp. 734.

(*s*) *Mayor* v. *Suttle*, *ante*, p. 266.

these damages may be recovered by the master from the servant, and the verdict and judgment in the action against the master are evidence of the amount of these damages, but not of the circumstances under which they were recovered (t). If the captain of a ship engages in smuggling transactions, and thereby causes the ship to be forfeited and condemned, he is responsible in damages to the shipowner for causing the latter to lose his property (u).

Dismissal of skilled servants for incompetency.—If a labourer, servant, or artisan, professes to be skilled in some particular art, craft, or mystery, and has been hired as a skilled servant, and is found to be utterly incompetent to do what he has expressly or impliedly undertaken to perform, the employer is not bound to go on employing him to the end of the term, but may at once dismiss him (x).

Dismissal for misconduct.—If a servant wilfully disobeys or habitually neglects the just and reasonable orders of the master; if he absents himself repeatedly from the service, or refuses to perform his work, or to submit to the domestic regulations of the house, or is guilty of gross moral misconduct, or of fraudulent misrepresentation and deceit in the discharge of his duties, to the injury of his employer (y), the contract may be dissolved by the master, and the servant dismissed. The following instances of misconduct and disobedience have been held to warrant a dismissal of the servant and a dissolution of the contract by the master:—Being frequently absent and often sleeping out without leave (z); pregnancy (a); assaulting a fellow maid-servant with intent to ravish her (b); refusing to work during the customary hours of labour (c); habitually neglecting to perform the duties he had undertaken to discharge (d); refusing to conform to the hour of dinner (e); abusing and insulting the master and disturbing the peace of his family (f); trespassing unlawfully in game preserves, after having been cautioned and ordered not to enter them (g); enticing away the master's servants (h); becoming the father of a bastard (i); seducing the master's maid-servant; repeatedly coming home intoxicated (k); making fraudulent or grossly inaccurate

(t) *Green* v. *New River Co.*, 4 T. R. 590.

(u) *Blewitt* v. *Hill*, 13 East, 12.

(x) *Horton* v. *McMurtry*, 5 H. & N. 667; 29 L. J. Ex. 260.

(y) *Harmer* v. *Cornelius*, 5 C. B. N. S. 246; 28 L. J. C. P. 85.

(z) *Robinson* v. *Hindman*, 3 Esp. 235; as to pleading misconduct, see *Burgess* v. *Beaumont*, 7 M. & Gr. 962; *Lush* v. *Russell*, 5 Exch. 203.

(a) *R.* v. *Brampton*, Cald. 14, 16, 17.

(b) *Atkin* v. *Acton*, 4 C. & P. 208.

(c) *Lilley* v. *Elwin*, 11 Q. B. 742; 17 L. J. Q. B. 132.

(d) *Arding* v. *Lomax*, 24 L. J. Ex. 80.

(e) *Spain* v. *Arnott*, 2 Stark. 256.

(f) *Shaw* v. *Chairitie*, 3 C. & K. 25.

(g) *Read* v. *Dunsmore*, 9 C. & P. 588.

(h) *Lumley* v. *Gye*, 2 Ell. & Bl. 216; see *Bowen* v. *Hall*, 6 Q. B. D. 333.

(i) *R.* v. *Welford*, Cald. 57.

(k) *Wise* v. *Wilson*, 1 C. & K. 662.

entries in account-books (l); absence from the master's dwelling-house for a night to visit a sick mother against the will of the master, and after leave of absence had been asked for and refused (m); the setting up of a claim inconsistent with the relation of master and servant, such as a claim to be a partner (n); or the assertion of rights and privileges not warranted by the contract or the nature of the service, and injurious to the interests of the master (o). And it is apprehended that the entertaining of guests at the master's expense, without his knowledge and without any express or implied permission so to do, would be a good ground of dismissal. If a justifying cause for the dismissal exists, the master may avail himself of it as a defence to an action, although it may not have formed the ground of dismissal, and although the master may not have known of its existence at the time he discharged the servant (p).

The following instances of misconduct and disobedience of orders have been held *not* to constitute a sufficient ground of dismissal and dissolution of the contract of hiring and service without notice:—Temporary absence without leave, producing no serious inconvenience to the employer (q); occasional insolence of manners and sulkiness; occasional disobedience in matters of trifling moment, such as neglecting to come on one or two occasions when the bell rang; stopping at one hotel when ordered to stop at another (r); temporary absence on customary holidays (s), or for the purpose of having a severe hurt attended to (t), or for the purpose of procuring another situation, such absence being warranted by custom (u).

Warning—Notice to leave.—In the case of a yearly hiring, not made defeasible by custom or by the agreement of the parties, reasonable notice must be given on either side of the intention of determining the contract, which notice must expire with the current year of hiring, as in the case of a tenancy from year to year; but the same length of notice is not required in the case of a yearly hiring of a servant as is required in the case of a yearly hiring of land. A quarter's notice, given a quarter of a year before the expiration of the current year of hiring, would in all cases be amply sufficient; and a month's notice is often all that is required by custom and usage to determine the contract and entitle

(l) *Baillie* v. *Kell*, 6 Sc 379; 4 Bing. N. C. 638.

(m) *Turner* v. *Mason*, 14 M & W. 112; 14 L. J Ex. 311.

(n) *Amor* v. *Fearon*, 1 P. & D 398

(o) *Lacy* v. *Osbaldiston*, 8 C & P. 80.

(p) *Spotswood* v. *Barrow*, 5 Exch. 110; 19 L. J. Ex. 226.

(q) *Fillieul* v. *Armstrong*, 7 Ad. & E. 557.

(r) *Callo* v. *Brouncker*, 4 C & P. 518; *Cussons* v. *Skinner*, 11 M. & W. 161.

(s) *Reg* v *Stoke*, 5 Q B. 303.

(t) *Chandler* v. *Grieves*, 2 H. Bl. 606, n.

(u) *R.* v. *Islip*, 1 Str. 423; *R.* v. *Polesworth*, 2 B. & Ald. 483.

has been put an end to by the exercise of a power of defeasance vested in the parties; so that, if the servant dies in the middle of the year, his personal representatives will not be entitled to recover a proportionate part of the salary in respect of the time he actually served (*l*); and, if he is himself guilty of such misconduct as entitles the master to dissolve the contract and dismiss him from his service, he will lose all right to wages in respect of the portion of the year he has actually served (*m*). But, if the contract is put an end to by virtue of a power of defeasance vested in either of the parties by custom or by agreement, the wages are apportionable, and the servant must be paid *pro ratâ* up to the time of his departure. If, however, the contract is dissolved by mutual consent, and nothing is said of bygone services or wages not due at the time of the dissolution of the contract, no new contract arises by implication of law to pay wages *pro ratâ* (*n*).

Amount of wages recoverable—Deductions.—If the amount of wages to be paid has not been settled and agreed upon by the contract, there is an implied promise on the part of the employer to pay wages according to the customary and reasonable rate of remuneration. The master cannot deduct from wages money paid by him to effect the servant's cure from a dangerous illness (*o*). The wages in certain trades, moreover, cannot in general be lawfully paid otherwise than in the current coin of the realm (*post*, p. 1167).

Presumption of payment of wages.—If a servant has left a considerable time without claiming wages, the presumption is that all the wages have been paid (*p*). And, if it is usual, in the case of particular classes of servants and workmen, to pay the wages weekly or monthly, and many weeks or months have elapsed without any claim or demand on the part of the servant, there is a *primâ facie* presumption of payment (*q*).

Jurisdiction of County Court and of justices.—The Acts empowering justices to deal with disputes between various sorts of servants and their master having been repealed by the Conspiracy

(*l*) *Countess of Plymouth* v. *Throgmorton*, Salk. 65; 3 Mod. 153; *Cutter* v. *Powell*, 6 T. R. 326.

(*m*) *Car riens est due tanque le fin de l'an, quod nota, et le contract est entier, et ne poet ester sever.* Bro. Abr. fol. 57 (LABORER), pl. 48; *ib.* fol. 170, pl. 31; APPORTIONMENT, 26, pl. 13; Vin. Abr. (APPORTIONMENT), 8 & 9; *Spain* v. *Arnott*, 2 Stark. N. P. 256; *Huttman* v. *Boulnois*, 2 C. & P. 512; *Turner* v. *Robinson*, 5 B. & Ad. 789; *Ridgway* v. *Hung. M. Co.*, 3 Ad. & E. 171; *Lilley* v. *Elwin*, 17 L. J. Q. B. 135; Poth. Louage, No. 174.

(*n*) *Lamburn* v. *Cruden*, 2 Sc. N. R. 534; 2 M. & Gr. 253; *Aliter*, if there was no hiring for a year, or the master sends the servant away; *Bailey* v. *Rimmell*, 1 M. & W. 506; *Phillips* v. *Jones*, 1 Ad. & E. 333.

(*o*) *Sellen* v. *Norman*, 4 C. & P. 80.

(*p*) *Sellen* v. *Norman*, 4 C. & P. 81; *Evans* v. *Birch*, 3 Campb. 10; Parke, B., *Gough* v. *Findon*, 7 Exch. 50.

(*q*) Abbott, C. J., 4 C. & P. 81, n.

and Protection of Property Act, 1875 (*r*), an Act was passed in the same session (*s*), giving power to county courts and justices to deal with them.

Breach of a contract of service involving injury to others.—A wilful breath of contract to supply gas or water is subject to a penalty, and so is a wilful breach of any contract of service, the probable consequence of which will be to do injury to others or their property (*t*).

Dissolution of the contract by the death of the parties.—A contract of hiring and service is dissolved by the death of the master or servant (*u*). If the contract is made with a firm in partnership to serve the firm for a certain term, the contract is dissolved by the death of one of the partners (*x*).

Seamen's Wages.—By the 17 & 18 Vict. c. 104, amended by 43 & 44 Vict. c. 16, a summary remedy is provided for the recovery of seamen's wages which are not to be dependent on the ship's earning freight, and, in case of the death of the seaman, are to be apportioned and paid in manner therein provided (ss. 181—204) (*y*). The master is liable, the ship is liable, and the owner is liable for the mariner's wages (*z*). When seamen enter into articles to serve for a voyage or for a certain term, a contract by the master to pay increased wages for the services they are by the articles bound to render, is nugatory and void (*a*). A seaman's contract of service may be terminated either by final abandonment of the ship, or by discharge given by the master (*b*). By the Merchant Shipping Act, 1876 (*c*), in every contract of service between the owner of a ship and the master or any seaman, and in every instrument of apprenticeship, there is to be implied an obligation on the owner and master, that the owner, master and agents, and every agent, shall use all reasonable means to insure the seaworthiness of the ship.

Of contracts of apprenticeship.—When the employer exercises some trade, craft, or mystery, and it is made a term of the contract that he shall teach as well as employ and remunerate the servant for some specific period in return for the service rendered, the

(*r*) 38 & 39 Vict. c. 86, s. 17.

(*s*) 38 & 39 Vict. c. 90; with respect to disputes with other sorts of servants, the following are some of the statutes relating to them: iron trade, 1 Ann. st. 2, c. 22, s. 4; woolcombers and weavers, 12 Geo. 1, c. 34 (part of sect. 2 is repealed, see 38 & 39 Vict. c. 86, s. 17); cutlers, 57 Geo. 3, c. 115; colliers, 57 Geo. 3, c. 122; dyers, hat makers, &c., 22 Geo. 2, c. 27; bargees, &c., on Thames, 2 & 3 Vict. c. 71, s. 37; clothiers and weavers, 30 Geo. 2, c. 12; on the interpretation of the statute, see the cases of *Warburton* v. *Heyworth*, 6 Q. B. D. 1; *Grainger* v. *Ainsley*, 6 Q. B. D. 182.

(*t*) 38 & 39 Vict. c. 86, ss. 4, 5.

(*u*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326.

(*x*) *Tasker* v. *Shepherd*, 6 H. & N. 575, 30 L. J. Ex. 207.

(*y*) See also the 24 Vict. c. 10, and the 25 & 26 Vict. c. 63, s. 18, *et seq.*

(*z*) *The Stephen Wright*, 12 Jur. 732.

(*a*) *Ante*, p. 4; *Harris* v. *Carter*, 23 L. J. Q. B. 295.

(*b*) *The Warrior*, 1 Lush. 476.

(*c*) 39 & 40 Vict. c. 80, s. 5; see *Thompson* v. *Farrer*, 9 Q. B. D. 372.

contract amounts to an apprenticeship, a term derived from the French word *apprendre*, to learn. Every contract to serve on the one hand, and to employ and teach or instruct on the other, amounts to a contract of apprenticeship, and must be duly stamped (*d*). If there is an engagement on the part of the servant to serve and to learn, but no express or implied engagement on the part of the employer to *teach*, so that no action can be maintained upon the contract against the latter for neglecting to teach, the contract is a contract of hiring and service only, and not a contract of apprenticeship (*e*). It is not necessary that the words "to learn' and "to teach" should be used by the parties in framing their contract; for an agreement to take and maintain a person "after the manner of an apprentice" will constitute an apprenticeship. Nor need the word "apprentice" be used; for, wherever it appears to have been the intention of the parties that the one was to teach and the other to learn, the contract will be a contract of apprenticeship, whatever may be the words used to express that intention (*f*). As the contract is always made to last for more than one year, it must be authenticated by writing, signed by the party to be charged therewith (*ante*, p. 170). By the 5 Eliz. c. 4, s. 25, (repealed), the binding of an apprentice for the purpose of exercising trades was required to be made by indenture; but now, by the 54 Geo. 3, c. 96, s. 2, it is enacted that it shall be lawful for any person to take or retain or become an apprentice, though not according to the 25th, 30th, and 41st sections of the statute of Elizabeth, and that indentures, deeds, and agreements in writing entered into for that purpose, which would be otherwise invalid and ineffectual, shall be valid and effectual; but it is provided that the enactment shall not affect the immemorial customs of towns or bye-laws of corporations. It is essential to the validity of the contract that the consideration or premium be duly set forth upon the face of the instrument, in order that the proper amount of stamp duty may be secured thereon (*g*). An indenture of apprenticeship is sufficiently executed by the apprentice desiring a bystander to write his name for him opposite the seal, and by his then taking the deed and delivering it to his master (*h*).

Rights and liabilities of parties to indentures of apprenticeship.—An infant above the age of fourteen, and unmarried, is by the custom of London responsible upon covenants contained in indentures of apprenticeship executed by him just the same as if

(*d*) *R.* v. *Nether Knutsford*, 1 B. & Ad. 726.

(*e*) *R.* v. *Shinfield*, 14 East, 541; *R.* v. *Burbach*, 1 M. & S. 370.

(*f*) *R.* v. *Wishford*, 5 N. & M. 540.

(*g*) *R.* v. *Keynsham*, 5 East, 311; *Westlake* v. *Adams*, 5 C. B. N. S. 248; 27 L. J. C. P. 271.

(*h*) *R.* v. *Longnor*, 4 B. & Ad. 649.

he were of full age (*i*); but he is by the common law, where the apprenticeship is not within the city of London, exempt from all liability *ex contractu*, by reason of his minority (*ante*, p. 120). Therefore it is that his friends ordinarily become bound for his faithful service and good conduct during the period of the apprenticeship. The parties who covenant for the continued service and good conduct of an infant apprentice are not responsible upon their covenants for trifling and pardonable instances of misconduct, such as staying out on Sunday evenings half an hour beyond the time allowed (*k*), or for temporary absence and disobedience of orders, unattended by substantial injury to the master. But for all gross misconduct, and repeated or lengthened absence producing substantial injury to the master, they will be held responsible; and, if an infant apprentice, who has executed indentures of apprenticeship, avoids the contract on his coming of age, and refuses to continue in the service of his master, they are bound to make good whatever damage is sustained by the latter by reason of such repudiation of the contract (*l*). The sickness of the apprentice, or his incapacity to serve and to learn by reason of ill-health or an accident, does not discharge the master from his covenant to provide for him and to maintain him, inasmuch as the latter takes him for better and for worse, and must minister to his necessities in sickness as well as in health (*m*). If the master has covenanted to teach three trades, and ceases to carry on one of them, he is guilty of a breach of contract, and the apprentice may, if he pleases, refuse to continue to serve (*n*).

Profits acquired by a servant or apprentice in the course of or in connection with his service belong to the master. Where the apprentice of a waterman had been impressed and put on board a Queen's ship, where he earned two tickets, it was held that the tickets belonged to the master (*o*).

Where the contract is silent as to the place where the trade is to be carried on, it has been held that the apprentice is bound to follow his master wherever his trade is set up (*p*).

Misconduct of the apprentice—Dissolution of the contract.—The same amount of misconduct which, in the case of a contract of hiring and service, would authorize the master to dissolve the contract and discharge the servant, will not release him from liability upon his covenant in an indenture of apprenticeship (*q*),

(*i*) *Burton* v. *Palmer*, 2 Bulstr. 192.
(*k*) *Wright* v. *Gihon*, 3 C. & P. 583.
(*l*) *Cuming* v. *Hill*, 3 B. & Ald. 59.
(*m*) *R.* v. *Hales Owen*, 1 Str. 99; *Reg.* v. *Smith*, 8 C. & P. 153.
(*n*) *Ellen* v. *Topp*, 6 Exch. 424; 20 L. J. Ex. 241.
(*o*) *Barber* v. *Dennis*, 6 Mod. 69; *Anon* 12 Mod. 415.
(*p*) *Royce* v. *Charlton*, 8 Q. B. D. 1.
(*q*) *Winston* v. *Lynn*, 2 D. & R. 475; 1 B. & C. 460; *Wise* v. *Wilson*, 1 C. & K. 669; *Phillips* v. *Clift*, 4 H. & N. 168; 28 L. J. Ex. 153.

unless the contract in express terms gives the master power to dismiss the apprentice (r). But, if the apprentice is guilty of such an amount of misconduct as renders it impracticable for the master to maintain, employ, and teach him, according to the terms of the indentures, the master cannot be sued for neglecting to perform his covenants in that behalf, inasmuch as the capability and willingness of the apprentice to be instructed, maintained, and provided for by the master are naturally conditions precedent to the liability of the latter upon such covenants (s). If the apprentice deserts the master's service and enlists in the army, or contracts another relation which disables him from lawfully returning to his master, the latter is not bound to receive him back and instruct him if he returns (t). "By the custom of London it is a sufficient cause for a master to turn away his apprentice if he frequents gaming houses," although gaming may not be expressly prohibited by the indentures (u). If the fulfilment of the contract has not been prevented by the wrongful act of the master, the latter is not bound to refund any portion of the premium he has received (x). The indentures of apprenticeship of an infant apprentice may be avoided by the infant, so far as regards his own personal liability on the contract, on his coming of age; and the master must trust for the continuance of the service thereunder to the covenants of those who engage for the infant, unless the binding is under the authority of an Act of parliament (y). The contract may also be dissolved by cancelling the indentures, or by giving them up with the consent of all parties *animo cancellandi*; likewise by the death of the master or of the apprentice (z), or by the bankruptcy of the master (a). If the master dies during the term, his representatives are not bound to return any part of the premium, as there is only a partial failure of consideration (b); and, if the apprentice becomes permanently ill, the covenant that he shall serve during the term is discharged (c).

Discharge by Court of Summary Jurisdiction.—The Court has the same powers in case of a dispute between a master and apprentice as in a case between employer and workman, and as if the instrument of apprenticeship were a contract between employer and workman, and may make an order directing the

(r) *Westwick* v. *Theodor*, L. R. 10 Q. B. 224.
(s) *Mercer* v. *Whall*, 5 Q. B. 447 466; 14 L. J. Q. B. 267; *Raymond* or *Raymond* v *Minton*, L. R. 1 Ex. 244; 35 L. J. Ex. 153; *Brown* v. *Banks*, 3 Giff. 190
(t) *Hughes* v. *Humphreys*, 9 D. & R. 721; 6 B. & C. 680.
(u) *Woodroffe* v. *Farnham*, 2 Vern. 290.
(x) *Cuff* v. *Brown*, 5 Pr. 297.
(y) *Ex parte Davis*, 5 T. R. 715; *Ex parte Gill*, 7 East, 376.
(z) *Baxter* v. *Burfield*, 2 Str. 1266; 32 Geo. 3, c. 57.
(a) 32 & 33 Vict. c. 71, s. 33.
(b) *Whincup* v. *Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 104.
(c) *Boast* v. *Firth*, L. R. 4 C. P. 1; 38 L. J. C. P. 1.

apprentice to perform his duties, and, if he neglects, imprison him, or rescind the instrument of apprenticeship, and order the whole or part of any premium to be repaid (d).

Damages for refusing to employ, and for wrongful dismissal.—If a master or employer renounces the contract he has made with a workman or servant, and deprives him of the means of earning the stipulated remuneration, or refuses to take him into his employ, the jury, in assessing the damages, are justified in looking to all that has happened, or is likely to happen, to increase or mitigate the loss of the plaintiff down to the time of trial (e). If an action is brought by a domestic servant for a dismissal without the customary month's notice, a month's wages are recoverable as the agreed damages (*ante*, pp. 436—439, 451). If the contract is not defeasible by giving a month's notice, but is for a year's service, and the defendant is improperly discharged before the end of the year, he may recover for the work actually done by him up to the time of his dismissal, and for the damage he has sustained by being prevented from continuing his services and earning the stipulated hire (*f*) The action may be brought as soon as the dismissal takes place; and the measure of damages is an indemnity to the plaintiff for the loss he sustains by the breach. If he has found other equally eligible employment, the damages would be small; but, if not, they might far exceed the salary agreed to be paid (*g*).

Damages against apprentices.—Where an action was brought upon a covenant in an apprenticeship deed to recover damages for the loss of the services of the apprentice, it was held that damages were recoverable only up to the time of action brought, as the contract continued in force, and the apprentice might still be compelled to serve (*h*).

Title to clothes by hiring and service—Where the plaintiff had been hired as a servant by the defendant, at thirty guineas a-year and a suit of clothes, and had, on entering the service, been provided with the clothes, it was held that they did not become his property, and that he could not sue his master for detaining them until he had served a year (*i*).

(*d*) 38 & 39 Vict c 90, s 6, repealing 20 Geo. 2, c 19, s. 4; *Finley* v *Jowle*, 12 East, 248; *Re Gray*, 2 D. & L 539

(*e*) *Hochster* v. *De La Tour*, 22 L J Q. B. 455; *Lake* v. *Campbell*, 4 Law T. R N. S. 582.

(*f*) *Ante*, p 451, *Cutter* v. *Powell*, 2 Smith's L. C. 20

(*g*) *Emmens* v *Elderton*, 4 H L. C 645.

(*h*) *Lewis* v. *Peachey*, 1 H. & C. 518; 31 L J Ex 496

(*i*) *Crocker* v. *Molyneux*, 3 C. & P. 470.

SECTION III.

PRINCIPAL AND AGENT.

Of agencies and commissions.—Whenever one man undertakes the management of the business of another without hire or reward, and enters upon his task, the contract between the parties is, as we have before seen, a contract of mandate, or a gratuitous commission (*ante*, p. 376). When the person employed is to be paid for his services, the contract is a contract for the letting and hiring of work and labour, care and attention, and belongs to the class *locatio operis faciendi* (*ante*, p. 383). If the services of the party are hired for a term, the contract is a contract of hiring and service (*ante*, p. 434). In either case the party employing is the principal, and the person employed the agent. If a commission-agent is engaged to sell goods for the principal, he paying him a certain sum per quarter, it does not necessarily follow that there is a contract of hiring and service between the parties (*a*).

In all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation, are to be for the benefit of his employer (*b*). Thus, interest made by an agent, by the use of his principal's money, belongs to the principal (*c*), and not only interest, but every other sort of profit or advantage, clandestinely derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for. So that, if an agent who has purchased goods according to order, sells them again to advantage with the view of appropriating the gain to himself, although he should have answered the loss, if any; yet his employer is entitled to the profits (*d*). Thus, where the captain of a ship, in letting it to Government for six months, had stipulated with the Government officer by whom the ship was taken up, that a sum of money should be paid to him for his own benefit, in addition to the freight, it was held that the money belonged to the ship-owner (*e*). So where the master of a ship in a foreign port claimed to retain for his own benefit the premium upon a bill drawn upon England on account of the ship, on the ground that there had been a usage for masters of ships to appropriate such premiums to their own use, it was held that the money belonged

(*a*) *Butterfield* v. *Marler*, 3 C. & K. 163.

(*b*) Story on Agency, s. 211.

(*c*) *Rogers* v. *Bochin*, 2 Esp. 702.

(*d*) Paley on Principal and Agents, p. 51.

(*e*) *Thompson* v. *Havelock*, 1 Campb. 527.

to the owner, and not to the captain (*f*). Where an army agent and contractor, who had been employed by the plaintiff to provide a reasonable outfit for her son, debited the plaintiff with the full amount of the invoice prices charged by the tradesman supplying the outfit, though discount had been allowed him in each instance, it was held that the plaintiff was entitled to the discount (*g*). Where the defendant represented to the plaintiff that he could procure him some shares in a company at £3 a share, and transferred certain shares to the plaintiff, and was paid £3 a share, and the plaintiff subsequently discovered that the defendant was himself the owner of the shares, and had lately purchased them for £2 a share, the defendant was ordered to pay back the difference in the price (*h*). Where the plaintiff authorized the defendant, as his broker, to negotiate for the purchase of a ship, and the defendant, without the knowledge of the plaintiff, received £225 from the vendor out of the purchase-money, it was held that the plaintiff was entitled to recover the £225 from the defendant (*i*). But where a ship-owner employed merchants to insure for him, and they charged him full premiums, but were allowed discount by the underwriters beyond brokerage, it was held that, as the allowance was usual, and the shipowner appeared to have accepted the terms, he could not afterwards recover the discount (*k*).

Revocation of authority.—If no term of service has been expressly or impliedly agreed upon, the employer may at any time dispense with the future services of the agent, and revoke the authority delegated to him, so far as it relates to things to be done and remaining unexecuted. If a party is engaged as a "permanent attorney," the word "permanent" does not confer any durable or special appointment as attorney, and the principal is not precluded from withdrawing the retainer; but if he is retained at a yearly salary, he is, in general, entitled to damages, if he is dismissed before the end of the year (*l*). Things actually done by the agent in the execution of his commission will, of course, be binding upon the principal; but the agent cannot, after his authority has been countermanded, enter, as between himself and the principal, into any fresh transaction. If the principal furnishes his agent with a sum of money, to be expended in the purchase of property, the principal may at any time, before the purchase is made and the money expended, revoke the authority, and require the money to be repaid to him (*m*). If goods are intrusted to a commission-

(*f*) *Diplock* v. *Blackburn*, 3 Campb. 43.

(*g*) *Turnbull* v. *Garden*, 38 L. J. Ch. 331.

(*h*) *Kimber* v. *Barber*, L. R. 8 Ch. 56.

(*i*) *Morrison* v. *Thompson*, L. R. 9 Q. B. 480.

(*k*) *Baring* v. *Stanton*, 3 Ch. D. 502; and see *G. W. Ins. Co.* v. *Cunliffe*, L. R. 9 Ch. 525.

(*l*) *Emmens* v. *Elderton*, 13 C. B. 495; 4 H. L. C. 624.

(*m*) *Fletcher* v. *Marshall*, 15 M. & W. 763.

agent for sale, the principal may, at any time before a sale has been made, require the goods to be returned to him (*n*); and the agent has no right to sell contrary to the express directions or instructions of his employer, for the purpose of repaying himself his advances (*o*). But the right to stop money intrusted to an agent to be paid to a third party, or to stop a sale, or revoke the orders or authority given, is always subject to this limitation, that the agent is merely an agent, and is not himself interested in, or responsible for, the payment of the money according to the directions he received when it was placed in his hands (*p*), and has not done anything to render himself personally liable to the third party in consequence of the orders of the principal (*q*). But mere advances made by a factor do not give him any rights in derogation of the right of the principal to give directions as to the time and manner of sale, unless such rights are conferred upon the factor by some express agreement, or by a known usage of trade (*r*). If an agent agrees to act for a firm in partnership for a term of years, the contract is dissolved by the death of one of the partners during the term (*s*).

When the agent's authority is irrevocable.—An authority coupled with an interest cannot be revoked. Where, therefore, a debtor handed to his creditor a power of attorney, authorizing him to sell certain lands of the debtor, and pay the debt out of the proceeds of the sale, it was held that this power of attorney could not be revoked (*t*).

Accounts.—It is the duty of an agent to keep regular accounts and vouchers (*u*); and, if he refuses to account, after demand is made, he will be responsible in damages (*x*). If goods have been intrusted to an agent to sell, and he renders no account of them, it will be presumed *primâ facie*, that they have been sold, and the money received (*y*). If an agent mixes up his principal's property with his own, he must show clearly what part of the property belongs to him; and, if he fails in doing so, it will be treated as the property of the principal (*z*). An agent who stands in a fiduciary relation to his principal cannot set up the Statute of Limitation in bar of a suit for an account by his principal (*a*).

Liabilities of brokers, factors and commission-agents, to their

(*n*) *Raleigh* v. *Atkinson*, 6 M. & W. 670.

(*o*) *Smart* v. *Sandars*, 3 C. B. 380; 16 L. J. C. P. 39; *Chinnock* v. *Sainsbury*, 30 L. J. Ch. 409.

(*p*) *Yates* v. *Hoppe*, 9 C. B. 541.

(*q*) *M'Ewen* v. *Woods*, 11 Q. B. 13; 17 L. J. Q. B. 207.

(*r*) *De Comas* v. *Prost*, 2 Moo. P. C. N. S. 158.

(*s*) *Tasker* v. *Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207.

(*t*) *Gaussen* v. *Morton*, 10 B. & C. 731; *Clerk* v. *Laurie*, 2 H. & N. 200.

(*u*) Romilly, M. R., *Stainton* v. *The Carron Co.*, 24 Beav. 353.

(*x*) *Topham* v. *Braddick*, 1 Taunt. 575.

(*y*) *Hunter* v. *Welsh*, 1 Stark. 224.

(*z*) Storey's Eq. Jur., s. 468.

(*a*) *Burdick* v. *Garrick*, L. R. 5 Ch. 233.

principals.—All persons are brokers who contrive, make, and conclude bargains and contracts between merchants and tradesmen, for which they have a "fee or reward" (*b*). Every broker and commission-agent who is employed to make purchases, or to sell on behalf of his principal, impliedly promises to execute the commission intrusted to him in a careful, skilful, and diligent manner, and to obey the orders and directions he receives. If he is ordered to purchase an article of first-rate quality, and he buys an inferior commodity, he is guilty of a breach of contract, and is responsible to the principal in damages (*c*). He is bound to exercise his judgment and discretion to the best advantage for the benefit of his principal, to render just and true accounts, and to keep the property of his principal unmixed with his own property, or the property of other parties (*d*). He has, in general, an implied authority to sell at such time and for such prices as he may, in the exercise of his discretion, think best for his employer; he may sell on credit, if it is customary so to do, or if he acts under a *del credere* commission; and he must account for the produce of all sales effected by him when called upon so to do (*e*). He cannot himself become the purchaser of the property entrusted to him to sell, unless he deals for it with the principal, openly and fairly, "at arm's length," and after a full disclosure of everything he knows concerning it (*f*); nor can he purchase his own goods for his principal (*g*). Where an agent employed to sell land sold it to a company in which he was interested as a share-holder and director, it was held that he was entitled to no commission from his employer in respect of the sale (*h*).

If money has been paid by a principal to his brokers to enable them to carry out a contract which he had authorized, and which, at the time of such payment, he believed them to have entered into on his account, whereas, in truth, the authorized contract had never been made, the principal may recover the money from the agents (*i*).

A mere forwarding agent is not bound to see whether the quality of goods, which he is employed to ship or to forward, corresponds with a contract which he has been instrumental in negotiating (*k*).

(*b*) *Milford* v. *Hughes*, 16 M. & W. 177

(*c*) *Mainwaring* v. *Brandon*, 2 Moore, 125.

(*d*) *Clarke* v. *Tipping*, 9 Beav. 284; *Thom* v. *Bigland*, 8 Exch. 725; *Gray* v. *Haig*, 20 Beav. 238.

(*e*) *Crosskey* v. *Mills*, 1 C. M. & R. 298; *Boorman* v. *Brown*, 3 Q. B., 515, 527; *Boden* v. *French*, 10 C. B. 886.

(*f*) *Murphy* v. *O'Shea*, 2 Jones & Lat. 422, *Trevelyan* v. *Charter*, 9 Beav. 140.

(*g*) *Bentley* v. *Craven*, 18 Beav. 76.

(*h*) *Salomans* v. *Pender*, 3 H. & C 639; 34 L. J. Ex. 95.

(*i*) *Bostock* v. *Jardine*, 3 H. & C. 700; 34 L. J Ex. 142.

(*k*) *Zulchenbart* v. *Alexander*, 1 B. & S. 234; 29 L. J. Q. B. 236; 30 ib. Q. B. 254.

Liability of principals to brokers, factors and agents.—The principal is not bound by the unauthorized acts of his agent, but he is bound where the authority is pursued, or so far as it is distinctly pursued. But the question may often arise whether, in fact, the agent has exceeded what may be deemed the substance of his authority. Thus, if a man should authorize an agent to buy 100 bales of cotton for him, and he should buy fifty for him at one time of one person, and fifty at another of a different person, or if he should buy fifty only, being unable to purchase more at any price, or at the price limited, the question would arise whether the authority was well executed. In general it might be answered that it was, because, in such a case, it would ordinarily be implied that the purchase might be made at different times of different persons, or that it might be made of a part only, if the whole could not be bought at all, or not within the limits prescribed (*l*). Thus, where a principal gave an order to his agent to purchase one hundred bales of cotton, and he purchased ninety-four, that being all he could puchase, exercising all diligence, it was held that he had fulfilled his contract (*m*). And where the principal ordered five hundred tons of sugars, and the agent could only get, from several different persons, four hundred tons, it was held that the principal was bound to accept the four hundred tons (*n*). The question is one of the interpretation of the contract limiting the authority of the agent. The agent is bound to use due diligence to fulfil his duty or authority given to him (*o*).

Del credere *commissions.*—When the agent, in consideration of an additional commission, guarantees to his principal the payment of all debts that become due through his agency to the principal, he is said to act under a *del credere* commission, a phrase derived from the Italian word *credere*, to trust (*p*). Every person accepting and acting under a commission of this sort for the sale of goods makes himself responsible for the solvency of his vendees, and becomes absolutely liable to the principal for the payment of the price of the goods he sells (*q*). Factors and commission-agents for sale, who receive and sell goods for foreign principals, or for parties residing at a distance, usually conduct their agency under a *del credere* commission, guaranteeing the solvency of the buyers or undertaking for the due payment of the price realised on sales effected by them. Their contract, however, is not a contract or promise, as we have seen (*ante*, p. 168), to answer for the debt or

(*l*) Story on Agency, s. 170.
(*m*) *Johnston* v. *Kershaw*, L. R. 2 Ex. 82.
(*n*) *Ireland* v. *Livingston*, L. R. 5 H. L. 395.
(*o*) *Ireland* v. *Livingston*, *supra*.
(*p*) *Grove* v. *Dubois*, 1 T. R. 12.
(*q*) *Mackenzie* v. *Scott*, 6 Bro. P. C. 291.

default of another within the meaning of the Statute of Frauds, but an original independent contract, and only another form of selling goods (*r*). Where a factor having a *del credere* commission has made advances to his principal, and has sold goods on account of the latter, he cannot, whether he has received the proceeds of the sale or not, recover from the principal so much of the advances as is covered by the price of the goods, unless there is an express agreement between them, making the advances payable immediately, and postponing the time of payment of the price of the goods (*s*). A person to whom goods are sent to be sold, and who is at liberty to sell them at any price he pleases, he paying a fixed price for them to the owner, is not an agent (*t*).

Liabilities of insurance-brokers to their principals.—If an insurance-broker neglects to attend to the orders of his principal, or is guilty of misconduct and negligence in effecting an assurance, he will be responsible for all the damage that has been sustained by his employer, and may be clothed with all the responsibilities which would have devolved upon the underwriter had the insurance been regularly effected. He may be compelled to pay to his principal the full sum ordered to be insured, or a total or average loss, as the case may be; but, when he is proceeded against for losses by perils which he ought to have insured against, he is, of course, entitled to every benefit and objection which the underwriter himself could have taken advantage of if the assurance had been duly effected, such as fraud, deviation, non-compliance with warranties, or the like (*u*). He is bound, moreover, to exercise a reasonable and proper amount of care, skill, and judgment in the execution of his duty (*x*). If a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that the latter will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases; and, although he has no effects, yet, if the course of dealing between them be such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless he receives notice to the contrary. If the merchant abroad sends bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction (*y*). If the

(*r*) *Couturier* v. *Hastie*, 8 Exch. 40; *Wickham* v. *Wickham*, 2 Kay & J. 478.

(*s*) *Graham* v. *Ackroyd*, 10 Hare, 202.

(*t*) *White, ex parte*, L. R. 6 Ch. 397.

(*u*) *Park* v. *Hammond*, 2 Marsh. 191; *Hough* v. *Barber*, 4 Campb. 150; *Turpin* v. *Bilton*, 6 Sc. N. R. 447.

(*x*) *Chapman* v. *Walton*, 10 Bing. 57; 3 M. & Sc. 389; *Cahill* v. *Dawson*, 26 L. J. C. P. 253.

(*y*) *Smith* v. *Lascelles*, 2 T. R. 189; *Corlett* v. *Gordon*, 3 Campb. 472.

broker finds that he is unable to affect an insurance upon the terms offered by the principal, it is his duty to give the latter notice of the fact. If he makes the insurance on terms different from those prescribed, he will be responsible to the principal (z). But, if insufficient orders are sent, and the agent or broker does all that is usual to get the insurance effected, that is sufficient (a). The insurance-broker is agent for both parties: first, for the assured, in effecting the policy, and in everything that is to be done in consequence of it; then he is agent for the underwriter as to the premium, but for nothing else. If he neglects to pay the premium to the underwriter, the latter may maintain an action for its recovery, unless circumstances have occurred entitling the insured to a return of the premium, in which case it is the duty of the broker, if he has notice thereof, to retain the money and return it to the insurer (b). If he has acted as the agent of the underwriter in paying the loss upon the policy, the payment by the broker is a payment by the underwriter himself (c). It is the usage amongst merchants, insurance-brokers, and underwriters, in the city of London, to set off the general balance of accounts between the broker and the underwriter, at the time of the loss, against the loss, and for the broker then to debit himself to that amount in his account with the assured, and the underwriter is then considered to be discharged of his debt to the assured; and, when the assured is cognizant of this course of dealing, and assents to it, the passing of the accounts between the broker, the underwriter, and the assured, operates as a payment to the latter, and as an extinguishment of the underwriter's debt (d). The broker now keeps two accounts with underwriters, called the credit and the cash accounts, into which the premiums received from the principals of the broker go, and the balance on which is due from the broker to the underwriter, and in no way from the individual assured, whose particular premium has gone into that account (e). The authority given to a broker when he is to effect a policy of insurance does not extend to warant him in cancelling it (f).

Share-brokers and stock-brokers.—If a share-broker, directed to buy shares, buys what is ordinarily bought and sold in the stock market as shares, he has fulfilled his commission, and cannot be made responsible for the fraud or misconduct of parties who may have issued the shares without authority. There is no warranty

(z) *Callender* v. *Oelrichs*, 6 Sc. 761.

(a) *Smith* v. *Cologan*, 2 T. R. 188, n.

(b) *Shee* v. *Clarkson*, 12 East, 507,

(c) *Edgar* v. *Bumstead*, 1 Campb. 410; *Jamieson* v. *Swainstone*, 2 ib. 547, n.

(d) *Stewart* v. *Aberdein*, 4 M. & W. 211.

(e) As to broker's accounts, see *Beckwith* v. *Bullen*, 8 El. & Bl. 683; 27 L. J. Q. B. 162; and *Xenos* v. *Wickham*, 14 C. B. N. S. 460; 33 L. J. C. P. 19.

(f) *Xenos* v. *Wickham*, L. R. 2 H. L. 296; 36 L. J. C. P. 316.

or undertaking, either on the part of a broker employed to buy shares or scrip, or on the part of the principal who employs him, that the article, which merely passes through the broker's or the principal's hands, is anything more than what it purports on the face of it to be, and what it is generally understood to be in the market (*g*). Every principal who employs a stock-broker or share-broker to transact business for him in the stock or share market is bound by the rules of the Stock Exchange and the established mode of transacting business, whether he knew of the usage or not (*h*), unless the rules are unreasonable (*hh*). If a share-broker sells pursuant to his authority, and the principal neglects to deliver the shares, and the broker is consequently obliged to buy other shares in the market, he is entitled to recover from his employer, all the damages, costs, and expenses, besides the customary remuneration for his trouble and loss of time (*i*). And, generally, whenever the share-broker has been compelled by the custom of the Stock Exchange to make good the default of the principal, he has a remedy over against the latter. Therefore, if he pays calls on shares which he has purchased for his principal, he may recover the amount from the latter (*k*).

Solicitors are, as we have already seen, bound, in common with all professional men, to act faithfully and diligently, and exercise a reasonable degree of care and skill in the conduct and management of the business intrusted to them to execute (*ante*, p. 407). Gifts and purchases by a solicitor from his client are, as we shall see (*post*, p. 1179), invalid, unless the confidential relationship has been determined as regards the particular transaction, and some disinterested advice has been taken and acted upon by the client (*l*); but the validity of the purchase cannot be impeached by a stranger (*m*). If a solicitor discontinues proceedings in an action which he has commenced by direction of his client, he is bound to show a reasonable and satisfactory ground for such discontinuance; and he must, in general, give due notice to his client of his intention to discontinue; and, if he improperly throws up a cause, he has no right to be paid *pro ratâ* for his work and labour (*n*). If a cause

(*g*) *Lamert* v. *Heath*, 15 M. & W. 486; 15 L. J. Ex. 298; *Mitchell* v. *Newhall*, 15 M. & W. 308; 15 L. J. Ex. 292; *Westropp* v. *Solomon*, 8 C. B. 373.

(*h*) *Sutton* v. *Tatham*, 10 Ad. & E. 27; *Bowlby* v. *Bell*, 3 C. B. 284; *Pollock* v. *Stables*, 12 Q. B. 774; *Coles* v. *Bristowe*, L. R. 4 Ch. 3; *Nickalls* v. *Merry*, L. R. 7 H. L. 530; see however, *ante*, p. 204. As to Stock Exchange Rules not being binding upon outside creditors, see *Ex parte Saffery*, 3 Ap. Cas. 213; *Ex parte Grant*, 13 Ch. D. 667.

(*hh*) *Pearson* v. *Scott*, 9 Ch. D. 198, and *Robinson* v. *Mollett*, *ante*, p. 204.

(*i*) *Bayliffe* v. *Butterworth*, 1 Exch, 425.

(*k*) *Bayley* v. *Wilkins*, 7 C. B. 899; *Taylor* v *Stray*, 2 C. B. N. S. 175; 26 L. J. C. P. 287.

(*l*) *Holman* v. *Loynes*, 18 Jur. 839; *Simpson* v. *Lamb*, 7 Ell. & Bl. 84; *Gibbs* v. *Daniel*, 4 Giff. 1.

(*m*) *Knight* v. *Bowyer*, 26 L. J. Ch. 769.

(*n*) *Nicholls* v. *Wilson*, 11 M. & W. 106.

which he is retained to conduct fails through his negligence, he cannot recover from his client money expended by him subsequently to such negligence. "If he is not entitled to charge for his labour, he cannot charge for his money" (*o*). A solicitor is responsible to the client for all sums received by him in the conduct of the business entrusted to him, and must render a true and faithful account thereof when called upon so to do. Where, on a sale of real estate, the solicitor of the vendor receives the deposit as agent of the vendor, he has not, in the absence of any stipulation to that effect, any duty, like that of an auctioneer, to the vendee, but must pay it over to his principal, the vendor, on demand (*p*). He is responsible also, as we have already seen, for the safe investment of all moneys intrusted to, and accepted by, him for investment (*ante*, p. 379). But the town agent of a country solicitor is not responsible to the clients of the latter for money received whilst conducting their causes or legal proceedings. The privity of contract is solely between the town agent and his principal and employer, the country solicitor; he knows nothing of the clients of the latter, and is bound to account only to his principal (see *post*, p. 476). But the court will, as before mentioned, sometimes interfere summarily for the protection of the client. The solicitor must, in general, one month before action against his client, deliver his bill of costs, signed by him, to his client (*q*); and, when his bill has been paid, he is bound to deliver up, if called upon, all papers and documents in his hands belonging to his client, in good order and properly arranged (*r*).

Sheriff's officers, expressly employed by a solicitor to execute process, may maintain an action against the latter for the recovery of such fees as are usually allowed on the taxation of costs by the course and practice of the courts, and are not bound to resort to the clients of the solicitor for remuneration (*s*).

Duties of estate and house agents.—A house-agent employed to procure a tenant for a house is bound to use due care and caution in the letting of the house, and to make all proper and necessary enquiries touching the respectability and solvency of the tenant. If, therefore, he lets the house to a notoriously insolvent person, or to one whom he knows to be insolvent, he will be responsible in damages to his employer (*t*).

Receipt of money and goods by agents on account of their principals.—It is a settled rule that an agent shall not, after

(*o*) *Lewis* v. *Samuel*, 8 Q. B. 685.
(*p*) *Edgell* v. *Day*, L. R. 1 C. P. 80; 35 L. J. C. P. 7.
(*q*) *Phipps* v. *Daubney*, 16 Q. B. 514; *Smith* v. *Pococke*, 22 L. J. Ch. 545.
(*r*) *North-West Ry. Co.* v. *Sharp*, 18 Jur. 964.
(*s*) *Foster* v. *Blakelock*, 8 D. & R. 48.
(*t*) *Heys* v. *Tindall*, 1 B. & S. 296; 30 L. J. Q. B. 362. As to commission, see *post*, p. 472.

accounting with his principal and receiving money in his capacity of agent, afterwards say that he did not do so, and did not receive it for the benefit of his principal, but for some other person (*u*), unless there has been a mistake and a void payment *ab initio*, so that the money never was in truth received for the principal. But, if the agent effects a contract of sale at a high price in consequence of a fraudulent misrepresentation made by him, and receives such price, but is afterwards compelled to refund the money to the purchaser, the principal cannot maintain an action for money had and received against the agent, to recover the price, inasmuch as the sale is avoided by the fraud of the agent, and the money received under it becomes the property of the purchaser, and is not money had and received for the use of the principal (*x*). And although an agent has received goods from his principal to hold on account of the latter, or although he has received goods from a third party, and has agreed to hold them for his principal, he may, under certain circumstances, set up a *jus tertii*. Thus, if an auctioneer has received goods for public sale from a person who is not the owner of them, and has no right to sell them, and the real owner intervenes and forbids the sale, or claims the money realised by the sale, the auctioneer may set up the title of such real owner against the claims of the fictitious owner from whom he received the goods (*y*). But, although in many cases a bailee may set up against a claim by his bailor the *jus tertii*, yet, if the bailee has accepted the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such a claim as against the bailor (*z*). So, where a wharfinger received notice that goods deposited at his wharf were marked with a fraudulent imitation of a trade-mark, and that the owner of the trade-mark was about to apply to the Court of Chancery for an injunction to prevent the sale of the goods, and, after the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the owner, it was held that he was justified in such refusal (*a*).

Where a managing owner of a ship, or "ship's husband," employed certain agents for general purposes, and amongst others to receive and pay monies on account of the ship, and kept a general account with them, and also a separate account as managing owner or ship's husband of the ship's disbursements and earnings, and, in order to obtain the freight earned by the vessel

(*u*) *Dixon* v. *Hamond*, 2 B. & Ald. 313; *Hawes* v. *Watson*, 2 B. & C. 540; *Edgell* v. *Day*, 35 L. J. C. P. 7; L. R. 1 C. P. 80.

(*x*) Parke, B., *Murray* v. *Mann*, 17 L. J. Ex. 256; 2 Exch. 541.

(*y*) *Biddle* v. *Bond*, 6 B. & S. 225; 34 L. J. Q. B 137; *Hardman* v. *Wilcock*, 9 Bing. 382.

(*z*) *Ex parte Davies*, 19 Ch. D. 86.

(*a*) *Hunt* v. *Maniere*, 33 Beav. 157; 34 L. J. Ch. 142.

from the East India Company, it was necessary that a receipt signed by the managing owner, and by one or more of the other owners also, should be given for the money due, and, upon a receipt of this description, the agents received 2,000*l.*, which was placed by them to the credit of the managing owner in his account with them, it was held that the money was received by the agents as agents of the managing owner, and that the transaction was in effect the same as if the other joint-owners and the managing owner had received the money, and it had been then handed over to the managing owner, who had then placed it in the hands of the agents, as his bankers, on his own account, and that the joint-owners could not treat the agents as their debtors (*b*). But, where the plaintiffs were owners of a ship, and one of them was ship's husband, and the latter instructed the defendant at Quebec to charter the vessel from thence to England, and the defendant effected a charter-party, making the freight payable to himself at Quebec, and received the freight, and claimed to retain it in liquidation of a debt due to him from such ship's husband it was held that the contract between the ship's husband and the ship agent with respect to the management and chartering of the vessel was a contract which belonged to all the shipowners, and that the defendant was bound to pay over to them the money received under that contract (*c*).

Receipt of money by sub-agents.—Every agent is responsible for money received by a sub-agent employed by him for the purpose of receiving the money, whether the principal had, or had not, reason to suppose that there was any necessity for the employment of a sub-agent. Thus, if the customer of certain bankers hands them a bill, in order that they may receive the money due upon it, and they send the bill to their correspondents at a distant place, and the bill is presented by them, and the amount paid, the payment to the sub-agent employed by the bankers for the purpose of receiving the money is a payment to the bankers to whom the bill was delivered by the customer, and they are responsible to him for the money, although it never reaches their hands and is never passed by them to the credit of the customer (*d*). The sub-agent so employed to receive money is accountable only to the agent, his employer, and cannot be sued for the money by the principal (*e*). But, if he is not strictly a sub-agent, as, for example, if he has received direct instructions from the principal, or is in

(*b*) *Sims* v *Brittain*, 4 B. & Ad. 375.

(*c*) *Walshe* v. *Provan*, 8 Exch. 843.

(*d*) *Mackersay* v. *Ramsays*, 9 Cl. & Fin. 845.

(*e*) *Ireland* v. *Thompson*, 4 C. B. 149; 17 L. J. C. P. 248; *Stephens* v. *Badcock*, 3 B. & Ad. 354; *Cartwright* v. *Hately*, 1 Ves. jun. 292; Storey's Agency, s. 203.

any respect the agent of the latter, he will be accountable accordingly. Thus, where a creditor employs a country solicitor to recover a debt, and the country solicitor employs a London solicitor to set the legal machinery in motion, and the debt is paid to the London solicitor, the latter is accountable to the client for the money, and cannot retain it in satisfaction and discharge of a debt due to him from his immediate employer, the country solicitor (*f*).

Payment by one agent to another agent.—Where an agent who receives money for his principal pays it over to another agent of that principal, he is bound to pay it in such a way as shall enable the agent to perform his duty to his principal, *i.e.*, he must pay in cash, and not merely settle it in account between that agent and himself; or, if he does so settle it, he takes it on himself to show an authority from his principal, and that there was an account between the principal and that agent, on which the principal was indebted to the latter (*g*).

Purchases by the agent with the money of the principal.—The property of a principal intrusted to his factor or agent belongs to the principal, notwithstanding any change which the property may have undergone in point of form, and even though the agent may have mixed the proceeds with his own money. Where, therefore, a draft for money was intrusted to a broker to buy exchequer bills for his principal, and the broker received the money and purchased American securities with it, and absconded, and was taken on his way to America, and surrendered the securities to his principal, it was held that the principal was entitled to the securities so purchased as against the assignees of the broker, who had become bankrupt (*h*). But the rule does not apply where there is no fiduciary relation between the parties (*i*).

Frauds by agents on their principals.—Agents are in a sense trustees, and they owe to their principals a similar duty to that which trustees owe to their *cestui que trust*. Therefore, when two agents concur in a fraud, both are liable in equity, although one of them only has the benefit of the fraud. Where two confidential agents of a partnership conspired together to obtain for themselves the shares of the partners at an undervalue by keeping the accounts of the firm fraudulently so as to conceal from the partners the true value of their shares, it was held that their misconduct might be treated as a breach of trust (*k*).

An agent cannot, without the knowledge of his principal, be

(*f*) *Hanley* v. *Cassan*, 11 Jur. 1088; *Ex parte Edwards*, 8 Q. B. D. 262.

(*g*) Alderson, B., *ib.*

(*h*) *Taylor* v. *Plumer*, 3 M. & S. 562; see *In re Hallett's Estate*, 13 Ch. D. 696; *Harris* v. *Truman*, 7 Q. B. D. 340; 9 Q. B. D. 264, C. A.

(*i*) *New Zealand and Australian Land Co.* v. *Watson*, 7 Q. B. D. 374.

(*k*) *Walsham* v. [illegible]*ton*, 33 L. J. Ch. 68.

allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent; and this rule applies with peculiar stringency to the directors of joint-stock companies, who are the agents of the company for effecting the sales or purchases made by the company (*l*).

Payment of commission.—If the amount of commission is named by the principal in his letter of instruction to the agent, and the agent declares that it is quite inadequate, but nevertheless acts upon the instructions, he will be bound by the specified commission. If he accepts the retainer, he must take it in its entirety, and cannot adopt part and repudiate part, and sue for a reasonable remuneration for his services (*m*). A commission-agent, employed to negotiate a sale upon the terms that he is to be paid a commission on the amount of purchase-money, or on the happening of a certain event, will not be entitled to any commission until the purchase-money has been received, or the event has happened unless there has been fraudulent delay or wilful neglect on the part of the employer (*n*). In the ordinary course of commercial dealings a compensation is impliedly understood to be due to every person who undertakes the duties and services of an agent, the amount being generally governed by the usage of trade; but parties who sell as mortgagees or trustees are not entitled to commission, in the absence of any express contract or agreement to pay them for their services (*ante*, p. 387). Where a broker took an assignment of several cargoes in trust to sell on their arrival, and out of the proceeds to repay the amount of his advances, and some of the cargoes were received and sold by him under the power in the deed, whilst the rest were sold under an order made in a suit instituted by him to enforce his security, it was held that in the latter sales he was entitled to his ordinary commission, but not in the former, as he sold, as regarded them, as a trustee (*o*). The fact that a party has agreed to sell goods on commission may be proved by oral evidence, though the terms as to the payment of such commission have been reduced into writing (*p*). An authority to sell upon certain terms and for certain commission is revoked by the death of the principal before the authority has been acted upon and executed; and, if the agent sells after the death of the principal, he will not be entitled to the agreed commission, unless the personal representative has renewed the authority with knowledge of the contract (*q*). If the commission

(*l*) *Hay's case*, L. R. 10 Ch. 593.

(*m*) *Moore* v. *Maxwell*, 2 C. & K. 554.

(*n*) *Bull* v. *Price*, 5 M. & P. 2; 7 Bing. 237; *Alder* v. *Boyle*, 4 C. B. 635.

(*o*) *Arnold* v. *Garner*, 2 Ph. 231.

(*p*) *Whitfield* v. *Brand*, 16 M. & W. 282.

(*q*) *Campanari* v. *Woodburn*, 15 C. B. 400; 24 L. J. C. P. 13.

is to be paid on the "net proceeds," it is payable only on the actual sum which reaches the pocket of the principal after deducting all charges and expenses (*r*).

Extra work by agents.—For all work done by the agent in discharge of his business as agent he is paid by his commission, and can make no extra charge; but for work done by order of the principal, beyond his duty as an agent, he is entitled to make an extra charge, provided the work was done under circumstances fairly giving rise to an inference that he was to receive an extra remuneration (*s*).

Rights of ship-brokers to commission.—Ship-brokers are usually entitled, by the custom and usage of trade, to 5*l.* per cent. commission upon the freight payable upon charter-parties obtained and entered into by their aid and exertions; and, if the amount of freight is uncertain, they may, if they think fit, sue for a reasonable remuneration upon a *quantum meruit.* The right to the commission does not depend upon the fact of the ship's earning freight; and the claim is not liable to be cut down by the loss of the vessel, or her failure to get a cargo (*t*). When a ship-broker has introduced the captain of a ship and a merchant to each other, and they by his means enter into some negotiation for a voyage, the broker is, in general, by usage of trade, entitled to his commission if a charter-party is effected between them for that voyage, even though they may employ another broker to prepare the charter-party, or may write the charter-party themselves. And, if a broker, authorised by both parties, and acting as the agent of each, communicates to the merchant what the ship-owner charges, and also communicates to the ship-owner what the merchant will give, and he names the ship and the parties, so as to identify the transaction, and a charter-party is ultimately effected for that voyage, this broker is entitled to his commission; but, if he does not mention the names, so as to identify the transaction, he does not get his commission to the exclusion of another broker who afterwards introduces the parties personally to each other: for, if the ship and the parties are not named, the brokers might change the ship, and put in another, pending the negotiation (*u*).

Where a ship-owner employed A., a ship-broker, to procure a charter for his ship, and A. employed B., another broker, who procured the charter, evidence of a usage of trade was admitted to show that the second broker, who actually procured the charter,

(*r*) *Caine* v. *Horsfall*, 1 Exch. 519.

(*s*) *Marshall* v. *Parsons*, 9 C. & P. 658.

(*t*) *Hill* v. *Kitching*, 3 C. B. 306.

(*u*) *Burnett* v. *Bouch*, 9 C. & P. 624.

was entitled to his commission from the ship-owner (*x*). But to render the ship-owner responsible upon an implied contract with the second broker, it must be shown that the ship-owner was cognizant of the employment of the latter, and knew, at the time he accepted the charter, that it had been obtained through his instrumentality (*y*). A usage of trade cannot be given in evidence to impose on the party who has entered into the contract another and wholly different obligation, and to show that, because he has agreed to consign the ship to the charterer's agents on the outward voyage, he is therefore liable to pay the agent's commission on the homeward cargo (*z*).

Right to commission of policy brokers.—By the 30 Vict. c. 23, s. 16, the principal is not to be liable to pay the broker's commission upon effecting a policy of sea insurance, or any premium paid by the broker, unless the policy is duly stamped; and any sums so paid are to be deemed to have been paid without consideration, and are to remain the property of the principal.

Right to commission of travellers for orders.—When a commission-agent, employed by a manufacturer to obtain orders, is to receive a commission "on all goods bought" by persons from whom he obtains orders, the commission is earned as soon as a valid bargain of purchase and sale has been made between the manufacturer and the purchaser introduced by such agent, whether the goods are at the time in existence or not in existence, and whether the contract is, or is not, ultimately carried into effect, and whether it turns out to be a bad bargain, productive of loss, or an advantageous transaction (*a*).

Commission of house-agents, estate-agents, and auctioneers.—If a man having a house or estate to sell or let, places it in the hands of several house-agents, with instructions to secure a purchaser or tenant, the successful agent is alone entitled to commission, unless instructions have been given to the other house-agents to advertise the house, or render some particular or special services in the matter, entitling them by the custom of the trade to some remuneration (*b*). But if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to his commission, although the actual sale was not effected by him (*c*). Where A. promised to pay B. a sum of money if he would procure him a tenant at a certain rent, it was held that B. was entitled to the money as soon as a party introduced by him had been accepte

(*x*) *Smith* v. *Boutcher*, 1 C. & K. 574. But see *Schmaling* v. *Tomlinson*, 6 Taunt. 147; *Roulton* v. *Jones*, 2 H. & N. 564.

(*y*) *Smith* v. *Boutcher*, 1 C. & K. 576.

(*z*) *Phillips* v. *Briard*, 1 H. & N. 27; 25 L. J. Ex. 233.

(*a*) *Lockwood* v. *Levick*, 8 C. B. N. S. 603; 29 L. J. C. P. 340.

(*b*) *Prickett* v. *Badger*, 1 C. B. N. S. 296; 26 L. J. C. P. 33.

(*c*) *Green* v. *Bartlett*, 14 C. B. N. S. 685.

by A., and a binding agreement for the tenancy had been entered into (*d*). In a great number of instances house-agents go to a great deal of trouble on the terms that, if they get no purchaser they shall have no claim; and, if upon the contingencies which have happened nothing was to be paid, nothing can of course be recovered (*e*). Where an auctioneer was employed to sell ground-rents by auction, on the terms of receiving one per cent. commission on the sale, and, after he had advertised the sale, but before the day of sale, the employer sold the rents by private contract, it was held that a notorious custom in the trade, for the auctioneer to receive his full commission in such a case, might be engrafted upon the contract (*f*). But the usage must be so universal that every one in the trade must be taken to know it (*g*).

The right of the agent to be re-imbursed upon the revocation of his authority depends upon the terms of the contract by which his services were retained, and the custom and usage of the trade in which he is engaged. When an agent is employed to sell or to let, on the terms that he is to be paid a certain percentage on the price or the rent, the general understanding is that he takes his chance of a large remuneration in case he finds a purchaser or a tenant, but gets nothing if he fails in so doing; but, if trouble and expense have been properly incurred by the agent in endeavouring to carry into effect the instructions of the principal, and the latter revokes the authority, and prevents the agent from reaping the expected reward, the principal is bound to remunerate him for his trouble and expenses in the matter (*h*).

Where an estate-agent, employed to sell at a given price, succeeds in finding a purchaser, but the principal then declines to sell, the agent is entitled to sue for a reasonable remuneration for his services; and the amount of his commission on the price would seem to be the sum to which he is fairly entitled; but, if the authority is revoked before it is executed and a purchaser has been found, it does not follow that he is entitled to sue upon an implied contract for remuneration for his work and labour in endeavouring to find a purchaser or a tenant (*i*). If it is the practice of house-agents to charge a fee for entering property to be let or sold in their register book, and the employer has notice of this, or it is proved to be a known custom of the trade, the employer will be bound to pay this fee, although the authority may be revoked, or the agent may have failed to render any beneficial

(*d*) *Horford* v. *Wilson*, 1 Taunt. 15.
(*e*) *Green* v. *Mules*, 30 L. J. C. P. 343.
(*f*) *Rainy* v. *Vernon*, 9 C. & P. 559.
(*g*) *Wood* v. *Wood*, 1 *ib.* 60.
(*h*) *Simpson* v. *Lamb*, 17 C. B. 616.
(*i*) *Prickett* v. *Badger*, 1 C. B. N. S. 296; 26 L. J. C. P. 33; *Campanari* v. *Woodburn*, 15 C. B. 407; 24 L. J. C. P. 13.

service. This registration fee is all that the house-agent is entitled to charge for ordinary services, in the absence of any special instructions for advertisements (*k*).

Where a public company employed a broker to dispose of their shares, on the terms that he should be paid 100*l.* down, and 400*l.* in addition upon the allotment of the whole of the shares of the company, and the broker disposed of a considerable number of shares when the company was wound up, it was held that the broker was prevented from earning the 400*l.* by the act of the company, and was therefore entitled to sue them for damages (*l*).

Lien of factors and brokers.—Factors and brokers to whom goods are consigned to be sold have a lien for the general balance due to them from their employers or principals in the ordinary course of their business as factors, and for their acceptances on behalf of such employers, upon the goods whilst they are in their possession, and on the monies realised by the sale of them (*m*). This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists. The lien does not extend to a collateral debt not growing out of the relationship of principal and factor, such as a debt due for rent (*n*), nor to goods which have not actually reached the hands of the factor (*o*), and come into his possession with the consent and direction of the owner; consequently, if goods have been left at the factor's place of business by mistake or inadvertence (*p*), or have been taken possession of by him without the authority of the owner, he cannot set up a lien upon them for his balance (*q*). And, if the party from whom he receives the goods is only an agent, he cannot retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise if he has made advances on the credit of the deposit, not knowing the depositor to be an agent (*r*). The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor, but as an insurance-broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor (*s*).

(*k*) *Simpson* v. *Lamb*, 17 C. B. 616.

(*l*) *Inchbald* v. *Western Neilgherry, &c., Co.*, 17 C. B. N. S. 733; 34 L. J. C. P. 15.

(*m*) *Kruger* v. *Wilcox*, Ambl. 252; *Hudson* v. *Granger*, 5 B. & Ald. 31; *Hammond* v. *Barclay*, 2 East, 227; *In re Pary's Patent Felted Co.*, 1 Ch. D. 931.

(*n*) *Houghton* v. *Mathews*, 3 B. & P. 485.

(*o*) *Kinloch* v. *Craig*, 3 T. R. 123.

(*p*) *Lucas* v. *Dorrien*, 7 Taunt. 278.

(*q*) *Taylor* v. *Robinson*, 2 Moore, 730.

(*r*) *Pultney* v. *Keymer*, 3 Esp. 181.

(*s*) *Dixon* v. *Stansfield*, 10 C. B. 398.

Lien of packers.—A packer is entitled to a general lien on the goods of his customer which are in his hands (*t*), although they do not now so frequently make advances to their customers as they used to do (*u*).

Lien of insurance brokers.—Insurance-brokers have also, by the general usage and custom of trade, a lien for the general balance due to them from their employers upon all policies effected by them for such employers, and left in their hands, and upon all monies received by them upon such policies from the underwriters, unless the party for whom they effected the policy was himself only an agent in the matter, in which case the extent of the lien will depend upon the disclosure or concealment of the agency, and the degree of credit they may have given to the agent, under the impression that he was the party really interested in the policy. The lien does not extend to a collateral debt not incurred in respect of brokerage business. If a policy-broker is employed by an agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the assurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he receives thereon from the underwriters, to the extent of the debt due to him from the agent as well as for his commission and charges for effecting the policy (*x*). But, if there is the slightest indication of the agency to the broker, such as a declaration by a British subject in time of war that the property is neutral (*y*), or a statement that the assurance is to be effected "for a correspondent in the country" (*z*), or that the property to be insured belongs to a merchant abroad, who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading (*a*), the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

Lien of solicitors.—Solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed, and upon all the deeds and papers and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, not only for the costs of the

(*t*) *Green* v. *Farmer*, 4 Bur. 2214; *Ex parte Deeze*, 1 Atk. 228.

(*u*) *In re Witt*, 2 Ch. D. 489.

(*x*) *Mann* v. *Forrester*, 4 Campb. 61; *Westwood* v. *Bell*, *ib.* 355; *Olive* v. *Smith*, 5 Taunt. 56.

(*y*) *Maauss* v. *Henderson*, 1 East. 337.

(*z*) *Snook* v. *Davidson*, 2 Campb. 218.

(*a*) *Lanyon* v. *Blanchard*, *ib.* 597.

particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients (*b*). But the lien does not attach while the suit is still pending; and the parties may compromise the dispute and thus deprive the solicitor of his lien, if the compromise is *bonâ fide* (*c*). By the 23 & 24 Vict. c. 127, s. 28, the Court may charge the client's property recovered or preserved (*d*) through the instrumentality (*e*) of the solicitor with the payment of his costs (*f*). If the solicitor discharges himself during the suit he loses his lien, so far, at any rate, as relates to papers necessary for the successful prosecution of the suit; but it is otherwise if he is discharged by his client (*g*). A solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and cannot therefore refuse to produce it after his client's death until his costs have been paid. And, where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished; and it may be superseded altogether by the attorney's taking from the client security for his costs (*h*). A solicitor held the title-deeds of a mortgagor. He was also acting for the mortgagee, and continued to hold the deeds. The mortgagor filed a petition for liquidation, and the solicitor acting for the trustee sold the equity of redemption and received the purchase-money. It was held that he had a lien upon it for costs due to him from the mortgagor (*i*). A solicitor to a former trustee in a bankruptcy has a lien upon documents, the fruits of his own labour or expense, as against a new trustee (*k*). A solicitor cannot set up the lien of his London agent on the papers of his client against the claims of that client, the client having paid his solicitor's bill (*l*). The town agent of a country solicitor has a lien only as against the client upon the money recovered, and upon the papers in his hands in the particular cause in which he is engaged, for the amount due to him by the solicitor in that particular cause. He cannot set up a claim of lien as against the client for the general balance due to him from the country solicitor who employs him, and cannot retain the money or papers of the client

(*b*) *Stevenson* v. *Blakelock*, 1 M. & S. 535; *Lambert* v. *Buckmaster*, 2 B. & C. 616; *Blunden* v. *Desert*, 2 Dru. & W. 405; *Friswell* v. *King*, 15 Sim. 191; *Robins* v. *Goldingham*, L. R. 13 Eq. 440.

(*c*) *Morrison, Ex parte*, L. R. 4 Q. B. 153; S. C. *Sullivan* v. *Pearson*, 38 L. J. Q. B. 65; *Mercer* v. *Graves*, L. R. 7 Q. B. 499; 41 L. J. Q. B. 212.

(*d*) *Baile* v. *Baile*, *infra*; *The Heinrich*, L. R. 3 Ad. & E. 505.

(*e*) See *Twynam* v. *Porter*, L. R. 11 Eq. 181; *Heinrich* v. *Sutton*, L. R. 6 Ch. 865; *Re National Ins. Ass.* L. R. 7 Ch. 221.

(*f*) *Berrie* v. *Howitt*, L. R. 9 Eq. 1; *Re Keane*, L. R. 12 Eq. 115; *Baile* v. *Baile*, L. R. 13 Eq. 497; *Jones* v. *Frost*, L. R. 7 Ch. 773.

(*g*) *Faithful, In re*, L. R. 6 Eq. 325.

(*h*) *Genges* v. *Genges*, 18 Ves. 294; *Balch* v. *Lymes*, Turn. & R. 92.

(*i*) *In re Messenger*, 3 Ch. D. 317.

(*k*) *Ex parte Ralden*, 4 Ch. D. 129.

(*l*) *In re Andrew*, 30 L. J. Ex. 403.

to satisfy his general debt (*m*). And his lien is limited to the debt actually due from the client to the country solicitor, so that if the country client pays the country solicitor the lien is discharged, for the country solicitor can give the town agent no lien which he does not himself possess (*n*). But the London solicitor has a general lien against the country solicitor upon any money recovered in an action, for all costs for agency business, and disbursements due from the country solicitor, whether in the particular action or in any other proceedings; but as between the London agent and the client the lien extends only to the costs of the particular action (*o*).

A solicitor cannot set up a general lien for the balance due to him in respect of services not rendered by him as a solicitor; nor can he detain deeds and papers which do not come to him in his professional character. He has no lien, for example, where he acts or holds papers as town clerk (*p*), or steward of a manor (*q*); he cannot set up any lien which is inconsistent with the nature of his employment, or the terms or conditions, or express or implied trust upon which he received the papers (*r*). His right, moreover, is dependent upon the rights of his clients; and he cannot acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him (*s*). If a solicitor transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds, and writings of one partner in respect of the business done for the firm (*t*).

A solicitor acting for mortgagee as well as mortgagor thereby loses his lien on the deeds for costs due to him from the mortgagor, unless such lien is expressly reserved, even although the mortgagee may have known that the solicitor had such a lien (*u*). Where the plaintiffs in a suit mortgaged their interest in the estate to the defendants with the sanction of the solicitor, and nothing was said about costs, it was held the solicitor's charge, under the 23 & 24 Vict. c. 127, s. 28 (*supra*), ought not to be

(*m*) *White* v. *R. Ex. Ass. Co.*, 7 Moore, 249; *Moody* v. *Spencer*, 2 D. & R. 6; *Anon.*, 2 Dick. 802.

(*n*) *Waller* v. *Holmes*, 1 J. & H. 139; 30 L. J. Ch. 24; *Re Andrew*, 7 H. & N. 87; 30 L. J. Ex. 403; *Beatfield* v. *Barlow*, 38 L. J. Ch. 311; *Ex parte Edwards*, 8 Q. B. D. 262, C. A.; see *ante*, p. 469.

(*o*) *Lawrence* v. *Fletcher*, 12 Ch. D. 858.

(*p*) *Champernown* v. *Scott*, 6 Mad. 93.

(*q*) *Rex* v. *Sankey*, 5 Ad. & E. 428; *Newington Local Board* v. *Eldridge*, 12 Ch. D. 349.

(*r*) *Lawson* v. *Dickenson*, 8 Mod. 307; see *Re Faithful*, L. R. 6 Eq. 324; *Simmonds* v. *Great East. Ry. Co.*, L. R. 3 Ch. 797.

(*s*) *Hollis* v. *Claridge*, 4 Taunt. 807; *Esdaile* v. *Oxenham*, 3 B. & C. 229; *Lightfoot* v. *Keene*, 1 M. & W. 745; *Molesworth* v. *Robbins*, 2 Jones & Lat. 358.

(*t*) *Steadman* v. *Hockley*, 15 M. & W. 553; *Turner* v. *Deane*, 3 Exch. 836; see *Re Moss*, L. R. 2 Eq. 345.

(*u*) *In re Snell*, 6 Ch. D. 105.

postponed to the mortgage, as the defendants must have known of the rights of the solicitor (*x*).

Lien of shipmasters.—An agent cannot in general acquire a lien upon the property of his principal for work done by others whom he has employed and paid. But a shipmaster has a lien on the freight, not only for his wages, but for any expenditure which he may make in the ordinary discharge of his duties as master, and which is necessary for the performance of the voyage (*y*); and where he makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses, if the owner adopts the benefit of that contract, he must also bear its burthens. Where, therefore, the master of an ordinary seeking ship entered into a charter-party, under seal, to carry troops from the Mauritius to England, and stipulated, on his own responsibility, in the charter-party, that he would make certain alterations in the ship, in order to enable him to carry the troops, and at the Cape of Good Hope entered into another charter-party, not under seal, to a similar effect, and made the specified alterations, and paid money and drew bills to meet the expenses necessary to the making of these alterations, and the voyage was performed, it was held that, in equity, the master was first entitled out of the freight earned under these charter-parties, to be re-paid the sums advanced, and to be indemnified against the bills, and that the owner (or his mortgagee) was only entitled to the nett freight after deducting these charges (*z*). At common law the master has a possessory lien on the cargo, not only for freight, but also for general average (*a*). The captain of a ship or his agent has a lien upon the cargo which he has saved for the expenses of doing so, although such expenditure was not with the owner's consent nor for the purpose of enabling the owner to earn freight, but for the purpose of saving the cargo (*b*).

Lien of ship's husband.—The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer, and not in the nature of a charge on the freight; and, therefore, if he is removed from his office before he is in a position to receive the freight an assignee of his interest cannot maintain a claim to it as against the owners (*c*).

Lien of shipwrights.—A shipwright has a lien on a ship in his dock where he is to be paid in ready money as soon as the

(*x*) *Faithful* v. *Ewen*, 7 Ch. D. 495.
(*y*) *The Fironia*, L. R. 2 Adm. 65; 37 L. J. Adm. 60.
(*z*) *Bristow* v. *Whitmore*, 9 H. L. C. 391.
(*a*) *Cleary* v. *M'Andrew*, 2 Moo. P. C. N. S. 216.
(*b*) *Hingston* v. *Wendt*, 1 Q. B. D. 367.
(*c*) *Benyon* v. *Godden*, 3 Ex. D. 263, C. A.

repairs are finished and no credit is given (*d*), and so has a contractor who agrees to furnish engines, &c., to a ship, and even if part of the price is paid he retains his lien for the remainder (*e*).

Indemnification of agents.—The principal is bound to indemnify his agent in respect of all payments which may be made by the latter in the due course of his employment (*f*). If the agent has necessarily incurred liabilities and expenses in following out his instructions *boná fide*, he may sue the principal upon an implied promise of indemnity (*g*); but he cannot resort to the principal for an indemnity against the consequences of his own default, wrongful act, or want of skill and caution in the execution of his commission (*h*), although a general indemnity against all charges and expenses he may be put to in executing his commission may have been given to him by his employer (*i*). Nor is he entitled to be indemnified in respect of loss caused not by reason of his having entered into contracts which he was authorised to enter into by his principal, but by reason of his own insolvency (*k*). If the agent, in the execution of his commission, has been compelled to pay money on behalf of the principal, he is entitled to recover the amount from the latter, whether the principal has or has not been relieved from liability by the payment (*l*). If A. employs B. as a broker to buy shares in a company, according to the rules of the Stock Exchange, for a certain account day, and B., in accordance with such rules, pays for and takes a transfer of the shares on that day, A. is bound to re-pay B. the amount so paid, although before such account-day the company is being wound up under the 25 and 26 Vict. c. 89, s. 153, which enacts that every transfer of shares shall then be void, unless the Court otherwise orders (*m*). By the Roman and Continental law, it is laid down that there results from all agencies, mandates, and commissions, an implied contract on the part of the principal or employer to indemnify the agent for all his disbursements and expenses, and for all the liabilities incurred by him in the execution of his commission (*n*).

(*d*) *Raitt* v. *Mitchell*, 4 Camp. 146; *Franklin* v. *Hosier*, 4 B. & Ald. 341.

(*e*) *Ex parte Willoughby*, 16 Ch. D. 604.

(*f*) *Risbourg* v. *Bruckner*, 3 C. B. N. S. 823; 27 L. J. C. P. 90; *Taylor* v. *Stray*, 2 C. B. N. S. 175; *Westropp* v. *Solomon*, 8 C. B. 369; *Johnstone* v. *Usborne*, 11 Ad. & E. 549.

(*g*) *Adamson* v. *Jarvis*, 4 Bing. 71; 12 Moore, 241; *Betts* v. *Gibbins*, 2 Ad. & El. 57; 4 N. & M. 64; *Rawlings* v. *Bell*, 1 C. B. 960.

(*h*) *Toplis* v. *Grane*, 7 Sc. 641; *Farebrother* v. *Ansley*, 1 Camp. 347.

(*i*) *Ibbett* v. *De la Salle*, 30 L. J. Ex. 44.

(*k*) *Duncan* v. *Hill*, L. R. 8 Ex. 242; 42 L. J. Ex. 179.

(*l*) *Britain* v. *Lloyd*, 14 M. & W. 762; 15 L. J. Ex. 43; *Spurrier* v. *Elderton*, 5 Esp. 1; *Pettiman* v. *Keble*, 9 C. B. 701.

(*m*) *Chapman* v. *Shepherd*, L. R. 2 C. P. 228; 36 L. J. C. P. 113; *Biedermane* v. *Stone*, 36 L. J. C. P. 198; L. R. 2 C. P. 504.

(*n*) Dig. lib. 17, tit. 1. lex 12, s. 9; Poth. MANDAT, No. 68-75; Domat. liv. 1, tit. 15, s. 2.

Breach of warranty of authority by agents.—Where an agent pretended to be authorized by a specified firm to purchase a ship on their behalf, and it turned out that he had no authority, and the shipowner was obliged to look out for another purchaser of the vessel, and lost 250*l.* on the re-sale, it was held that the 250*l.* was the measure of damage in an action against the agent for a breach of an implied undertaking or promise that the authority which he professed to have did in point of fact exist (*o*). Where an agent pretended to be authorized to grant a lease, and it turned out that he had no such authority, it was held that the intended lessee was entitled to recover the value of the lease and all costs paid and incurred by him in endeavouring to enforce specific performance down to the time when the agent disclosed the fact of his want of authority, but not the damages and costs arising out of the re-sale by the intended lessee of his lease (*p*). So, where the defendant, the joint owner of an estate, contracted, without authority from his co-owners, to sell it to the plaintiff, and on their failure to complete the sale, the plaintiff sued them and failed, it was held that the plaintiff was entitled to recover from the defendant all costs up to the time when it appeared that the defendant had no such authority, as well as the expenses he had incurred in the investigation of the title, and the difference between the contract price and the market price of the estate, but not losses he had incurred on re-sale of stock bought for the purpose of stocking the land, as that was not shown to have been in the contemplation of the parties at the time of the sale (*q*). If a man puts money into the hands of another to purchase goods, and he neglects to make the purchase, and is sued for a breach of his undertaking in that behalf, the proper measure of damages is the value of the goods to the employer if they had been duly purchased, not the value of the money (*r*).

Negligence of bank-managers.—It is no breach of duty on the part of the manager of a bank to discount bills for companies in which he is interested, provided the advances are made within the scope of his authority and in the ordinary course of business, and no allegation of *mala fides* can be sustained, nor is he, it seems, under any obligation to disclose to the directors the fact

(*o*) *Simons* v. *Patchett*, 17 Ell. & Bl. 568, 26 L. J. Q. B. 195; and see further, as to damages recoverable for false representation of authority by agents, *Collen* v. *Wright*, 8 Ell. & Bl. 659; 27 L. J. Q. B. 215; *Hughes* v. *Graeme*, *ante*, p. 65; *Pow* v. *Davis*, *ante*, p. 65.

(*p*) *Spedding* v. *Nevell*, L. R. 4 C. P. 212; 38 L. J. C. P. 133; *Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*q*) *Godwin* v. *Francis*, L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*r*) *Ehrensperger* v. *Anderson*, 3 Exch. 158.

that he is a shareholder in companies keeping accounts with the bank (*s*).

So it is the duty of the shareholder who has sold shares to execute a transfer of them, although the company is winding up, and he will be liable to his broker, who has been obliged by the rules of the Stock Exchange to buy other shares for the purpose of delivery to the purchaser accordingly (*t*).

Damages for breach of warranty of authority.—Costs of previous legal proceedings.—A defendant is responsible in damages for the natural and ordinary consequences of the wrong done. Where, therefore, the defendant, who was employed as architect to superintend the building of a church, ordered stone for the church from the plaintiffs in A.'s name, and on his account, and the plaintiffs supplied the stone, and afterwards sued A. for the price, but failed in their action, and had to pay A.'s costs and the costs of their own attorney, because it was proved at the trial that the defendant had received no authority from A. to order the stone in his name, and the plaintiffs then brought an action against the defendant to recover the damages they had sustained by reason of his false assumption of agency and pretence of authority for the order he gave, it was held that the plaintiffs were entitled to recover from the defendant not only the value of the stone ordered by him in A.'s name, but also the costs they had incurred and paid in the former action (*u*). So where a land agent professed to have authority from a landowner to let land, and signed an agreement for a lease, and the landowner repudiated the lease and denied the authority, and the intended tenant, relying on the representation of the agent, filed a bill in Chancery against the landowner for a specific performance of the agreement, and notice of the suit was given to the agent, and the latter failed to withdraw his assertion of authority, he was held liable to pay the costs of the Chancery suit (*x*). But no person relying on a pretended authority of this sort ought in prudence to take legal proceedings against the supposed principal without giving notice to the pretended agent, and giving him an opportunity of withdrawing or verifying his assertion of authority (*y*).

(*s*) *Bank of Upper Canada* v. *Bradshaw*, L. R. 1 P. C. 479.

(*t*) *Biederman* v. *Stone*, L. R. 2 C. P. 504.

(*u*) *Randell* v. *Trimen*, 18 C. B. 786; 25 Law J. C. P. 307.

(*x*) *Collen* v. *Wright*, 7 Ell. & Bl. 311; 8 *ib.* 647; 26 Law J. Q. B. 147; 27 *ib.* 215; *Spedding* v. *Nevell*, L. R. 4 C. P. 212.

(*y*) Wightman, J., in *Collen* v. *Wright*, 26 Law J. Q. B. 151.

SECTION IV.

CONTRACTS FOR CARRIAGE.

Of contracts for the carriage of merchandise.—Every person who accepts goods and chattels for conveyance to a particular destination for hire or reward, paid or agreed to be paid him for the carriage of them, impliedly lets out his labour and care in return for the hire or reward agreed to be paid to him. The contract, therefore, belongs to the class LOCATIO OPERIS. It was styled by the Roman jurists LOCATIO OPERIS MERCIUM VEHENDARUM, or the letting out of the work of carrying merchandise. The owner who delivered the goods to the carrier to be carried was the letter of the work of carrying; and he was also at the same time the hirer of the labour and services of the carrier; whilst the carrier, on the other hand, was both the hirer of the work of carrying and the letter of his own labour and services, care, and attention, to be employed in and about the conveyance and transport of the merchandise. Such being the nature of the contract between the parties, the carrier may make a breach by negligently or wilfully omitting to take care, and an action may be brought for the breach of contract; or such negligent or wilful act may be treated as a "tort," regarding it as a breach of duty imposed by law upon the carrier. The cases upon the subject are somewhat conflicting (*a*). Of course the parties may, and in most cases practically do, enter into a specific contract of carriage, and their rights are then governed by the express terms of such contract, and the implied terms which the law will infer; but apart from any special contract, there is in every case of carriage for reward a contract between the parties.

Contracts of affreightment—Charter-parties.—When goods and merchandise are carried by sea from one place to another, they are usually shipped on board a vessel under a charter-party or a bill of lading. A charter-party is a contract whereby the shipowner or the shipmaster covenants or agrees for the use of the ship by the charterer for some specified period of time, or for a particular voyage or adventure. The contract derives its name from the Latin term *charta partita*, there being anciently as many divided parts of the contract as there were parties to it, each party having his part of the contract as a security against fraud or mistake.

(*a*) See *Alton* v. *Midland Ry.*, 19 C. B. N. S. 213; 34 L. J. C. P. 292; *Marshall* v. *Y. & N. Ry.*, 11 C. B. 655; *Austin* v. *G. W. Ry.*, L. R. 2 Q. B. 442; *Berringer* v. *Gt. Eastern Ry.*, 48 L. J. C. P. 400; *Fleming* v. *M. S. & L. Ry.*, 4 Q. B. D. 81; *Foulkes* v. *Met. Ry.* 4 C. P. D. 267; 5 C. P. D. 157.

The customary stipulations on the part of the shipowner or master are, that the ship shall be tight and staunch, and well equipped and manned, and furnished with all the necessaries for the voyage; that she shall be ready by a day appointed to receive the cargo, and shall wait a certain number of days to take it on board, and, after lading, shall sail with the first fair wind for the destined port, and there (*b*) deliver the goods in proper order and condition to the order of the charterer; and, further, that during the continuance of the voyage the ship shall be tight and staunch, and furnished with sufficient men and other necessaries, to the best of the owner's endeavours. The charterer, on the other hand, usually covenants to load the ship after she shall be ready to receive her cargo, and unload her within a certain number of days, and to pay freight at so much per ton according to the tonnage of the vessel, or according to the quantity of goods shipped on board, or according to the time of the ship's employment. *Primâ facie*, the law of the place where a contract is made is that which the parties are to be presumed to have adopted as the footing upon which they dealt; and such law ought to prevail in the absence of circumstances indicating a different intention. But a contract of affreightment made between a charterer and shipowner of different nationalities in a place where they are both foreigners may, under some circumstances, be construed by the law of the nation of the ship (*c*). But where an English merchant insured goods with English underwriters in a French ship, it was held that the policy was not to be construed according to French law (*d*).

When the contract operates as a demise or bailment of the ship.—Although the shipowner, by the charter-party, expressly grants the vessel to be used by the charterer, the contract will, nevertheless, not amount in general to a demise or bailment of the ship to the charterer, so as to clothe him with the possession of the vessel, but simply to a contract for the use of the ship, together with the services of the master and crew, for the conveyance of merchandise, *i.e.*, to a contract for the letting and hiring of the work of carrying merchandise. If the end sought to be attained by a charter-party can be accomplished without a transfer of the possession of the vessel to the charterer, the courts will not give effect to the contract as a demise of the ship, although there may be express words of grant and demise (*e*). If, however, the nature of the service and the due

(*b*) Sometimes the terms are to proceed to a port or so near thereto as the ship may safely get, see *Capper* v. *Wallace*, 5 Q. B. D. 163; *Dahl* v. *Nelson*, 6 Ap. Cas. 38.

(*c*) *Lloyd* v. *Guibert*, 6 B. & S. 100; L. R. 1 Q. B. 115; 35 L. J. Q. B. 74.

(*d*) *Greer* v. *Poole*, 5 Q. B. D. 272.

(*e*) *Christie* v. *Lewis*, 5 Moore, 258; 2 B. & B. 410; *Saville* v. *Campion*, 2 B. & Ald. 510; *Dean* v. *Hogg*, 4 M. & Sc. 195.

attainment of the object sought to be accomplished require the vessel to be absolutely under the control, and subject to the orders and directions, of the charterer; if she is to be employed in warfare, or in the fishing or coasting trade, or as a general ship for the conveyance of merchandise by the charterer for third parties, and is to be at the general disposal of the latter to sail upon any service that he may require, the courts will give effect to the contract as a demise of the ship(*f*). In this case the contract is a contract for the letting and hiring of a chattel, and belongs to the class LOCATIO REI (*ante*, p. 343). The services of the master and crew pass as merely accessorial to the principal subject-matter of the contract; they attorn as it were to the charterer, and become temporarily the servants of the latter, bound to obey his orders.

Parties to charter-parties.—If the parties have contracted by deed, the contract is with those who have executed the instrument, and covenanted therein in their own names, or by some known title or description. If the charter-party contains covenants both on the part of the owners and the master for the conveyance of the cargo, and has been executed by both, either the owners or the master are responsible at the election of the covenantee. If it has been entered into and executed by the owners alone, they alone are liable upon it; whilst, if the master is the only executing party, the contract is with him alone, although the deed may be expressed to be made by him for and on behalf of his employers, the shipowners. If the master covenants in his own name, the contract is exclusively the contract of the master. He constitutes himself in such a case the carrier of the goods, and becomes personally responsible upon the express covenants contained in the charter-party, and also upon all such implied covenants and engagements as result from the contract and the nature of the employment (*g*).

When a charter-party of affreightment operates as a demise or bailment of the ship to the charterer, and the vessel is employed by the latter as a general ship for the conveyance of merchandise, the charterer becomes the carrier of the goods shipped on board, and the master is his servant and agent whilst procuring freight and contracting with third parties for the carriage of merchandise, and not the agent of the registered owners of the vessel, and the latter, consequently, cannot be made responsible for the loss of, or injury to, the goods shipped on board under such contracts (*h*). But, when the charter-party operates merely as a contract between

(*f*) *Trinity House* v. *Clerk*, 4 M. & S. 295, 299; *Hutton* v. *Bragg*, 7 Taunt. 14.

(*g*) *Horsley* v. *Rush*, cited 7 T. R. 209.

(*h*) *James* v. *Jones*, 3 Esp. 27; *Major* v. *White*, 7 C. & P. 41; *ante*, p. 58; *Newberry* v. *Colvin*, 1 Cl. & F. 283.

the charterer and the shipowner for the conveyance by the latter of goods and merchandise to be shipped on board by the charterer, the registered owners are then the carriers of the goods, and will be responsible to the charterer for the non-conveyance of them, according to their contract. And, if the ship is put up as a general ship, without any intimation that she is under charter, and third parties ship goods and take bills of lading from the master, the owners will be responsible for the proper stowage and safe carriage of the goods so shipped. If in such a case the master refuses to sign bills of lading, except "as per charter-party," the shipper cannot be compelled to accept such bills, but may insist on having his goods returned (*i*). Although the shipowners are not parties to a charter-party under seal, entered into by the master in his own name on their behalf, yet they are responsible for a breach of those duties and obligations which attach to them in their character of carriers, independently of the charter-party. Thus, where the plaintiff had shipped a cargo of oranges on board a vessel, of which the defendants were the owners, to be carried for hire from St. Michael's to London, but the defendants employed an unskilful master, through whose negligence the oranges were lost, it was held that the shipowners were responsible for the loss, although the goods had been shipped on board by virtue of a charter-party of affreightment under seal executed by the master, by which the latter had covenanted to convey the cargo to its destination (*k*). When the contract of affreightment is not under seal, the action for the breach of such contract, and of the implied promises and engagements resulting from the acceptance of goods to be carried for hire, may be brought, either against the owners who appoint the master to the command of the vessel, and constitute him their agent for the employment of the ship, or against the master who has accepted the goods to be carried, whether the contract is expressed to be made, or whether the goods have been accepted by him, in his own name only, or for and on behalf of his principals and employers; but, when the plaintiff has elected to proceed against and has sued one, the other is discharged (*l*). An agent is not ordinarily liable, as we have seen (*ante*, p. 63), upon simple contracts entered into by him in a representative character on behalf of his principal; but the master of a ship is considered to be something more than a mere agent, and is made responsible accordingly (*m*).

(*i*) *Peck* v. *Larsen*, L. R. 12 Eq. 378; 40 L. J. Ch. 763; see *Jones* v. *Hough*, 5 Ex. D. 115, C. A.

(*k*) *Leslie* v. *Wilson*, 6 Moore, 429; 3 B. & B. 171; *Fletcher* v. *Braddick*, 5 B. & P. 186; *Fenton* v. *Dub. St. P. Co.*, 8 Ad. & E. 843.

(*l*) *Priestley* v. *Fernie*, 3 H. & C. 977; 34 L. J. Ex. 172.

(*m*) *Ellis* v. *Tur[illegible]*, 8 T. R. 533;

Performance of the terms and conditions of the contract.— If, by a charter-party of affreightment, a shipowner agrees that his ship shall sail to a "safe port" to take in a cargo, the naming of a "safe port" is a condition precedent to the shipowner's liability to send out the vessel (*n*). The voyage begins from the time the vessel breaks ground to proceed to her place of loading; so that, if the charter-party contains the usual exception of dangers and accidents of seas, rivers, and navigation during the voyage, and the vessel is delayed or hindered by foul weather in getting there, the delay is within the exception (*o*). If the shipowner agrees that the vessel shall leave England on or before a particular day to bring back a cargo from a foreign port, or that she shall arrive at a foreign port by a particular day and shall be ready to receive cargo, the departure or arrival of the vessel at the time specified may constitute a condition precedent to the freighter's liability to provide the cargo, and use the ship, and pay freight (*p*). Whether it will do so or not depends on the intention of the parties, to be gathered from the language they have used, and that intention may be inferred from the consequences of the breach; so that, if the delay entirely defeats the object of the freighter in taking up the vessel, the agreement for departure or arrival by a certain day will be a condition precedent (*q*). Where, by charter-party, the freighter covenanted to pay freight for a vessel at so much a ton per month until her final discharge, so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days next after arrival there, and the remainder of the freight at specific periods, it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight (*r*). A shipowner by entering into a charter-party impliedly undertakes that the ship shall be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charter-party; and if the ship is not so fit, and cannot be made so in such a time as not to frustrate the object of the voyage, the charterer may decline to put a cargo on board, and may maintain an action against the shipowner (*s*).

Boson v. *Sandford*, 1 Show. 104; *Morse* v. *Slue*, 1 Ventr. 190, 238; *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; 9 Ex. 338; 41 L. J. Ex. 110; 43 L. J. Ex. 216.

(*n*) *Rae* v. *Hackett*, 12 M. & W. 724; 13 L. J. Ex. 216.

(*o*) *Barker* v. *M'Andrew*, 18 C. B. N. S. 759; 34 L. J. C. P. 191.

(*p*) *Glaholm* v. *Hayes*, 2 Sc. N. R. 471; *Shadforth* v. *Higgin*, 3 Campb. 385; *Lovatt* v. *Hamilton*, 5 M. & W. 644; *Oliver* v. *Fielden*, 4 Exch. 135; *Croockewit* v. *Fletcher*, 1 H. & N. 912; 26 L. J. Ex. 153; *Behn* v. *Burness*, 3 B. & S. 759; 32 L. J. Q. B. 204.

(*q*) *McAndrew* v. *Chapple*, L. R. 1 C. P. 643.

(*r*) *Graves* v. *Legg*, 9 Exch. 717; 23 L. J. Ex. 231.

(*s*) *Stanton* v. *Richardson*, L. R. 7 C. P. 421; 9 C. P. 390.

Representations in charter-parties.—If a vessel is described in a charter-party as A 1, it is a warranty that she is A 1 at the time the description is given, but not that she shall continue so, or retain the same letter on her arrival at the port of loading (*t*). A representation in a charter-party that the ship chartered is "now at sea, having sailed three weeks ago," is a warranty (*u*); and describing her as "the steam-ship H." is a warranty that the principal motive power is steam (*x*); but a representation that she is 180 tons when she is 200 is mere description and not a warranty (*y*). A statement in a charter-party that the ship is expected to be at Alexandria about the 15th of December is a warranty that she is then in such a place and under such engagement as that she may reasonably be expected to be at Alexandria about the day named (*z*). Whenever a descriptive statement in a charter-party was intended to be a substantive part of the contract, it will be construed as a warranty. Such a statement is more or less important, in proportion as the object of the contract more or less depends upon it. In some cases, if not performed by the party making it, it will enable the other to repudiate the contract *in toto*. In other cases it gives only a claim to compensation in damages for a breach of contract (*a*).

Substantial performance of conditions precedent.—Where the plaintiff covenanted to let his ship to freight to the defendants, and take a cargo on board, and proceed therewith to Naples and make delivery thereof to the agents of the defendants, and, having so done, receive on board a return cargo, and the defendants, in consideration of the premises, covenanted that they would provide a complete homeward cargo and pay freight, and the plaintiff received the cargo and proceeded with it to Naples, where it was seized by the Neapolitan Government, it was held that the material part of the covenant was the letting of the ship and the making of the voyage, and, as that had been performed, the defendants were bound to provide the return cargo and pay the freight (*b*). And, where the plaintiffs let a ship to the defendants, and covenanted to take on board at Havre six pipes of brandy, with such other goods as the captain might procure on freight, and proceed therewith to Terceira, and there take a cargo on board and proceed therewith to London, and the defendants, in consideration of the

(*t*) *Hurst* v. *Usborn*, 18 C. B. 154; 25 L. J. C. P. 209; *Routh* v. *Macmillan*, 33 L. J. Ex. 38; 2 H. & C. 750; *French* v. *Newgass*, 3 C. P. D. 163, C. A.

(*u*) *Ollive* v. *Booker*, 1 Exch. 416.

(*x*) *Fraser* v. *The Telegraph Construction Co.*, L. R. 7 Q. B. 566; 41 L. J. Q B. 249.

(*y*) *Baker* v. *Windle*, 6 El. & Bl. 674.

(*z*) *Corkling* v. *Massey*, L. R. 8 C. P. 395; 42 L. J. C. P. 153.

(*a*) *Behn* v. *Burness*, 3 B. & S. 753; 32 L. J. Q. B. 204; *Neill* v. *Whitworth*, 34 ib. C. P. 155; 18 C. B. N. S. 435.

(*b*) *Storer* v. *Gordon*, 3 M. & S. 308.

completion of the voyage, covenanted to pay freight, and guaranteed the ship a complete cargo home, and it appeared that the voyage to Terceira had been performed, and that the ship was ready to receive the return cargo at that place, it was held that the covenant relating to the taking on board the brandy at Havre and carrying it to Terceira was not a condition precedent to the liability of the defendants upon their covenant to provide the homeward cargo, but a distinct and independent covenant, for the breach of which the plaintiffs were liable in damages (*c*).

Time of performance.—If the vessel is to proceed to a particular port and there load a full cargo, the loading must be completed within a reasonable time; and, if unusual and extraordinary circumstances arise preventing the merchant from doing what he has undertaken to do, he must make compensation in damages, as he ought to have provided against the unforeseen contingency by his contract (*d*). Where, however, neither party is ready to perform his undertaking because both are prevented by some superior power, neither party can maintain an action against the other (*e*). An engagement to load with "the usual dispatch of the port" is absolute, and admits of no qualification to dispense with performance even where the performance is hindered by a casualty which the charterer could not prevent (*f*). Such an engagement covers the whole period from the time when the vessel is placed at the disposal of the charterer at the port in a condition to receive her cargo (*g*). If parties by advertisement hold out that they are ready to give a guarantee that a vessel shall sail on a particular day, and an intended passenger takes a berth on the strength of the assurance, the time named will be of the essence of the contract (*h*). But this is not the case, if merchandise is shipped on board, and the vessel carries it to the place of destination. Where, by charter-party, the plaintiff let his vessel to freight to the defendant, and covenanted that the vessel should sail with the *next* wind on a voyage to Cadiz, and the defendant covenanted that if the ship went the intended voyage, and returned to the Downs, the plaintiff should have so much by way of freight for the voyage, the substance of the covenant was considered to be that the ship should perform the intended voyage, that being the

(*c*) *Fothergill* v. *Walton*, 8 Taunt. 576; 2 Moore, 630; *Stavers* v. *Curling*, 3 Sc. 740; *Post* v. *Dowie*, 33 L. J. Q. B. 172; 34 *ib.* 127; 5 B. & S. 20; *Behn* v. *Burness*, *ante*, p. 487.

(*d*) *Adams* v. *Royal Mail, &c.*, 5 C. B. N. S. 497: 28 L. J. C. P. 33; *Ford* v. *Cotesworth*, L. R. 5 Q. B. 544; 39 L. J. Q. B. 188; *Dahl* v. *Nelson*, 12 Ch. D. 568, C. A.; 6 Ap. Cas. 38, see *post*, p. 510

(*e*) *Cunningham* v. *Dunn*, 3 C. P. D. 443, C. A.; *Ford* v. *Cotesworth*, *supra*.

(*f*) *Kearon* v. *Pearson*, 7 H. & N. 386; 31 L. J. Ex. 1.

(*g*) *Ashcroft* v. *Crow Orchard Colliery Co.*, L. R. 9 Q. B. 540; see however the cases, *post*, p. 511.

(*h*) *Cranston* v. *Marshall*, 5 Exch. 395; 19 L. J. Ex. 340.

primary intention of the parties, and not merely that she should sail with the next wind, which might change every hour, and that this was shown by the covenant of the defendant, who was to pay so much for the performance of the voyage, and not merely for sailing with the next wind (i). And, where the covenant was that the vessel should proceed with the *first* convoy to Spain and Portugal, and there make a delivery of the cargo, &c., in consideration whereof the defendant covenanted to pay freight, it was held that the main object of the contract was the performance of the voyage, and that the sailing with the first convoy was not a condition precedent to the plaintiff's right to recover freight for the voyage actually performed, but a distinct covenant, for the breach of which he was liable in damages (k). So, where the covenant was that the ship should sail on freight to Demerara on or before the 12th of February, and the vessel did not sail until the 12th of March, Lawrence, J., held that, as the voyage had been actually performed, and the cargo conveyed to the destined port, and the profit of it gained by the defendant, there could be no foundation for saying that the defendant should not pay the freight for it according to the covenant, and that he might bring a cross action to recover damages for the not sailing in time, if he had sustained any (l). And, where the plaintiff let his vessel to the defendant, and covenanted forthwith to make her tight, staunch, and strong, and well and sufficiently manned and victualled, &c., for a twelve-months' voyage, and the defendant covenanted to pay freight so much per ton per month, and the vessel was taken into the service of the defendants, who used her for several months, and then refused to fulfil their covenant to pay freight on the ground that the plaintiff had not manned and victualled the ship, and made her tight and strong, according to his covenant, it was held that, as the defendant had not repudiated the ship because she was not forthwith made tight, staunch, and strong, but had taken her into his service and navigated her, he had no right to insist that the forthwith making her tight, &c., was a condition precedent to his own liability upon the covenant (m). But where the plaintiff agreed to charter a ship at the completion of her then voyage, and she was detained as unseaworthy, and the repairs not finished for two months; it was held that the plaintiff had not got a ship reasonably fit for the purpose for which it was hired, and that he might abandon the charter-party (n).

Reasonable time of performance.—If a shipowner covenants

(i) *Constable* v. *Cloberie*, Palm. 397; *Bornmann* v. *Tooke*, 1 Campb. 377.

(k) *Davidson* v. *Gwynne*, 12 East, 380.

(l) *Hall* v. *Cazenove*, 4 East, 477.

(m) *Havelock* v. *Geddes*, 10 East, 564.

(n) *Tully* v. *Howling*, 2 Q. B. D. 182.

generally that a ship shall sail to a particular port, and there take on board a cargo to be provided by the charterer, the sailing of the vessel direct and without any deviation or delay to the appointed port is not a condition precedent to the charterer's liability to provide and ship the cargo; but, if the delay has been unreasonable, and the charterer has thereby lost all the benefit of the voyage, and been prevented from procuring the cargo, he will then be released from his liability upon the contract (o).

Waiver of time of performance.—If a shipowner agrees that his vessel shall leave England for a foreign port on or before a particular day to bring back a cargo, the departure of the vessel at the time specified is so far of the essence of the contract that the charterer or freighter will not be bound to provide the cargo and use the ship and pay freight unless the vessel sails at the time appointed (*ante*, p. 486), and proceeds by the direct and usual course to the place of destination, if the failure to depart at the time specified is such or the deviation is so long and unreasonable as to have put an end to the whole object the freighter had in view in chartering the ship (*p*): but, if the vessel sails after the time, and the charterer nevertheless ships the cargo on board and uses the ship, the time of the vessel's sailing from England is no longer of the essence of the contract, and he cannot refuse to pay freight and to fulfil his part of the engagement, because the vessel did not sail on the exact day specified. If it is covenanted by the shipowner that the ship shall be at a particular port by a day named ready to take a cargo on board, the charterer or freighter may not be bound by his covenant or agreement to ship a cargo on board and pay freight, if the vessel is not ready at the place appointed by the day named; but, if, after the day has passed, the cargo is shipped on board pursuant to the covenant, the time of shipment cannot be relied upon as a condition precedent to the payment of the freight (*ante*, p. 488).

Mode of performance—Complete cargo.—The performance of a contract that a vessel shall sail to a foreign port, and there load a particular cargo, is to be regulated, as regards the loading of the cargo, by the custom and usage of the port where the cargo is to be taken on board (*q*). If the charterer has agreed to load the ship with a full and complete cargo, he is bound, in certain cases,

(*o*) *Clipsham* v. *Vertue*, 5 Q. B. 265; *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L. J. Ex. 26, *Hurst* v. *Usborne*, 18 C. B. 144; 25 L. J. C. P. 209; *Jackson* v. *Union Marine Ins.*, L. R. 8 C. P. 572; 10 C. P. 125; see *Dahl* v. *Nelson*, 6 Ap. Cas. p. 53, *per* Ld. Blackburn.

(*p*) *Freeman* v. *Taylor*, 1 M. & Sc. 182; 8 Bing. 124; *Ollive* v. *Booker*, 1 Exch. 421.

(*q*) *Cuthbert* v. *Cumming*, 11 Exch. 408; 24 L. J. Ex. 310; *Hudson* v. *Clementson*, 18 C. B. 213.

to fill up interstices with broken stowage (*r*). In some cases he may load a full cargo of the lightest commodities; and, if any ballast is then wanting, it must be put in by the master (*s*). It is the duty of the owner of a vessel to stow the cargo with as much skill as a competent stevedore can do; but he is not responsible to the charterer, when the stevedore is appointed by the latter, although it is provided that he is to act under the master's orders; for such a provision only means that the master is to have a general control over the stevedore, so as to secure the proper trim and safety of the ship (*t*).

Impossibility of performance—Contracts to procure and carry cargoes and merchandise.—We shall hereafter see that it is a rule of law that, whenever a party enters into an absolute and unqualified contract to do some particular act, the impossibility of performance occasioned by inevitable accident, or by some unforeseen occurrence over which he had no control, will not release him from the obligation of his contract (*u*). Therefore, if a shipowner has covenanted to procure and ship on board a cargo of guano, corn, or timber at a specified port, the circumstance that no guano, corn, or timber, was to be procured at that port (*x*), or that its exportation had been prohibited (*y*), or that the loading of it on board was prevented by an embargo (*z*), or by want of water (*a*), or by the plague (*b*), will not constitute an answer to an action for the non-performance of the contract.

Implied authority of the agents of ship-charterers.—The agent of the charterer of a ship, to whom the ship is addressed for loading under a charter-party, has no implied authority to substitute a different voyage from that which is stipulated for by the charter-party, and cannot by agreement with the shipmaster substitute a different port of loading, or a different quality or description of cargo, from that prescribed by the charter-party (*c*).

Shipment and carriage of merchandise under bills of lading.—When the use of an entire vessel, or a certain amount of stowage therein, is not contracted for, but the merchant or owner of the goods merely sends certain parcels or packages of goods on board, to be conveyed to the port of destination, the master or commander of the vessel, or some person acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to

(*r*) *Cole* v. *Meek*, 15 C. B. N. S. 795; 33 L. J. C. P. 183.

(*s*) *Irving* v. *Clegg*, 1 Bing. N. C. 53; *Moorson* v. *Page*, 4 Campb. 103.

(*t*) *Blaikie* v. *Stembridge*, 6 C. B. N. S. 909; 28 L. J. C. P. 329.

(*u*) *Post*, p. 1195.

(*x*) *Hills* v. *Sughrue*, 15 M. & W. 261; *Kirk* v. *Gibbs*, 1 H. & N. 815; 26 L. J. Ex. 209.

(*y*) *Blight* v. *Page*, 3 B. & P. 295, n.

(*z*) *Sjoerds* v. *Luscombe*, 16 East, 201.

(*a*) *Schilizzi* v. *Derry*, 4 Ell. & Bl. 886.

(*b*) *Barker* v. *Hodgson*, 3 M. & S. 267; *Marquis of Bute* v. *Thompson*, 13 M. & W. 487.

(*c*) *Sickens* v. *Irving*, 7 C. B. N. S. 165; 29 L. J. C. P. 25.

the merchant sometimes two and sometimes three parts of a bill of lading (*post*, p. 935), of which the merchant commonly sends one or two to his agent, factor, or other person to whom the goods are to be delivered at the place of destination: that is, one on board the ship with the goods, another by the post or other conveyance, and one he retains for his own security (*d*). The bill of lading is a written or printed memorandum, signed by the master, acknowledging the shipment of the goods on board, and promising to deliver them at the port of destination to a person named as the consignee, or his assigns, on payment of freight, primage, and average, "the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted." The master, who thus acknowledges the receipt of the goods, and promises to carry and deliver them, is personally responsible for the fulfilment of his engagement (*e*); and the shipowner or charterer, who receives the fruit and earnings of the ship, is also liable upon the bill of lading, although he is not named therein (*f*). Delivery to the ship-owner's servants alongside the vessel is equivalent to a delivery on board (*g*). The duty to deliver the goods under a bill of lading arises on presentment of the bill; and, if it is not presented to the master on the arrival of the ship at her place of destination, the master is not bound to keep the goods for an indefinite time on board his ship, but may deliver them to any trustworthy person to be kept until the bill of lading is presented (*h*). A bill of lading signed by the master in his own name is not conclusive upon the shipowner as to the shipment of the goods mentioned therein (*i*), But it is so in the hands of a consignee or indorsee for valuable consideration, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact laden on board. But the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims (*j*). The person actually putting the

(*d*) Abbott on Shipping, by Serjt. Shee, 279.

(*e*) Domat, lib. 1, tit. 16, s. 2.

(*f*) *Cannan* v. *Meaburn*, 8 Moore, 127

(*g*) *British Columbia & Vancouver Island Spar, Lumber, and Saw-mill Co., Lim.* v. *Nettleship*, L. R. 3 C. P. 499: 37 L. J. C. P. 237.

(*h*) *Howard* v. *Shepherd*, 19 L. J. C. P. 255; 9 C. B. 321; and see the 25 & 26 Vict. c. 63, s. 67, *post*, p. 502.

(*i*) *Grant* v. *Norway*, 10 C. B. 688; *Hubbersty* v. *Ward*, 8 Exch. 334; *Jessel* v. *Bath*, L. R. 2 Ex. 267; 36 L. J. Ex. 149; *Brown* v. *Powell Coal Co.*, L. R. 10 C. P. 562.

(*j*) 18 & 19 Vict. c. 111, s. 3.

goods on board is the shipper, and the expression "wholly," &c., only means that the master or other persons signing must not in any way be mixed up with the fraud (*k*). The consignee has no right to deduct from the freight payable on delivery of goods the value of articles which, though mentioned in the bill of lading, turn out not to have been put on board (*l*).

Countermand of the shipment—Re-delivery of the goods to the consignor.—When goods have been shipped by a charterer or consignor on board a vessel to be carried and delivered to the consignee, pursuant to a contract of sale, or under bills of lading, or under any contract by which the ownership and right of property in the goods have been transferred to the consignee or some third party, the consignor's power over the goods is gone, and he cannot lawfully countermand the consignment and require the goods to be delivered back to him. He cannot, after he has ceased to be the owner of them, stop them *in transitu*, and prevent their delivery to the consignee, unless the latter has become bankrupt (*post*, p. 956). But, if the goods are merely addressed to the consignor's agent for sale, or under circumstances which do not divest the consignor of his ownership and right of property in the goods, he may countermand the consignment and require the goods to be returned to him, subject to the following qualifications and restrictions. If the ship is a general ship, carrying other goods besides those of the consignor, the goods must be demanded back a convenient time before the period appointed for the ship's sailing, and the demand must be accompanied by a tender of the freight, and of the reasonable costs and charges of the re-shipment and re-delivery of the goods, and the demand must appear to have been made at a time when it was reasonably in the power of the master to comply with it, without injury to the cargo or the property of other parties on board, and without creating delay in sailing. If the entire vessel has been chartered, the charterer may demand back the goods, on tendering all the reasonable charges and lawful claims of the shipowner and master upon them, together with the expenses of re-shipment (*m*). By the Spanish commercial code every person who embarks goods in a general ship may unload the goods shipped, paying half freight, the expense of loading and unloading, and all the damage to the other shippers, unless these last oppose the unloading, in which case they are entitled to the goods, and must take them upon themselves, paying the contract price (*n*). An owner of goods shipped

(*k*) *Valieri* v. *Boyland*, L. R. 1 C. P. 382; 35 L. J. C. P. 215.

(*l*) *Meyer* v. *Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289; *ante*, p. 197, *post*, p. 966.

(*m*) *Thompson* v. *Small*, 1 C. B. 328; 14 L. J. C. P. 157.

(*n*) Cod. de Com. 765, Art. cited 1 C. B. 355.

to proceed to a foreign port has a right to have them re-delivered to him when the vessel, having commenced her voyage, meets with a disaster, whereby the goods are damaged so much that they cannot be profitably carried to their destination (o).

Loss of or damage to goods by the way.—Whenever a party has absolutely contracted to carry cargoes or merchandise from one place to another, subject to certain express exceptions, he has impliedly contracted to carry them safely (p); and the circumstance that he has been prevented from fulfilling his contract by some casualty or inevitable accident will constitute no answer to an action brought against him for the recovery of damages for the breach of contract, if the casualty has not been expressly provided against by the contract. Therefore, where the defendant agreed to carry the plaintiff's goods by ship from Gibraltar to London, calling at Cadiz, and the goods were seized by the revenue authorities at Cadiz, and condemned and sold, it was held that such seizure and sale formed no answer to an action for the non-delivery of the goods (q). If the vessel becomes disabled, and gets to port in a sinking state, the master is bound to tranship and forward the cargo, if he has the means of transhipment at hand (r), and is allowed a reasonable time to do so (s); but, if the vessel is wrecked, and the master has no means of transhipment (t), and no prospect of obtaining any, or if the cargo is of a perishable nature, and cannot be transhipped and forwarded to the place of destination without risk of serious injury or total destruction, he is then clothed with an implied authority from the owners of such cargo to do the best he can with it for their benefit; and, if, being unable to communicate with the owner, he acts *bonâ fide* with ordinary diligence, forethought, and prudence, he exempts his employers, the shipowners, from all liability for the loss (u). But where there is no urgent necessity for selling the goods, and the master can communicate with the owners, he must not sell without leave of the owners (x), and if he does such sale is void (y). There is a duty on the master of a ship as representing the shipowner to take reasonable

(o) *Blasco* v. *Fletcher*, 14 C. B. N. S. 147; 32 L. J. C. P. 284.

(p) *Rogers* v. *Head*, Cro. Jac. 262; *Matthews* v. *Hopping*, 1 Keb. 852.

(q) *Spence* v. *Chodwick*, 10 Q. B. 517; 16 L. J. Q. B. 313; *Evans* v. *Hutton*, 5 Sc. N. R. 670; 2 Dowl. N. S. 600; *Gosling* v. *Higgins*, 1 Campb. 450.

(r) *Cannan* v. *Meaburn*, 8 Moore, 127.

(s) *The Soblomsten*, L. R. 1 Adm. 293; 36 L. J. Adm. 5.

(t) As to the duty of the master to tranship and forward the goods, see *Shipton* v. *Thornton*, 9 Ad. & E. 337; *Gibbs* v. *Grey*, 2 H. & N. 30; 26 L. J. Ex. 286; *Mathews* v. *Gibbs*, 2 El. & El. 282; 30 L. J. Q. B. 55; but see *The Hamburg*, 32 L. J. Adm. 161.

(u) *The Gratitudine*, 3 Rob. 261; *Ireland* v. *Thompson*, 4 C. B. 168; 17 L. J. C. P. 241; *The Australasian Steam Co.* v. *Morse*, L. R. 4 P. C. 222.

(x) *Acatos* v. *Burns*, 3 Ex. D. 282, C. A.

(y) *Atlantic Mutual Ins. Co.* v. *Huth*, 16 Ch. D. 474.

care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures when reasonably practicable under all the circumstances to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading; and for neglect of this duty by the master, the shipowner is responsible to the shipper (z). But he is not entitled to carry on goods in an unfit state against the express wish of the shippers in order to earn the freight (a). Damage done to a cargo by rats is not a danger or accident of the seas; and therefore, if a ship is greatly infested by rats and serious damage done to the cargo, the undertaker of the work of carrying is responsible for the injury, although he may have kept cats on board for the express purpose of destroying the rats (b).

Of the implied promise to carry safely.—Whenever goods have been bailed by one man to another upon the faith of an express or implied undertaking by the latter to carry them to a distant part, it is no answer to an action brought against him to recover damages for the breach of his engagement, to say that the goods were lost by the way, the very fact of the loss affording *primâ facie* evidence of neglect and want of care (c). If the goods have been stolen, or consumed by fire, or destroyed by accident, without fault or neglect or want of care and caution on the part of the undertaker of the work, the latter stands excused, and may avail himself of the robbery or the unavoidable accident as an answer to an action brought against him for the non-delivery of the goods to the consignee. "He is only," observes Holt, C.J., "to do the best he can; and, if he be robbed, &c, it is a good account; for it would be unreasonable to charge him with a trust further than the nature of the thing puts it into his power to perform it" (d). A loss by theft or secret purloining of goods is *primâ facie* evidence of negligent keeping; and the carrier must rebut this presumption by showing that he had taken all such precautions as appeared to be necessary to guard against it. In an action against the commander of a ship of war for the loss of two casks of dollars which had been delivered to him to be carried from the river Plate to London upon freight for hire, it appeared that on the arrival of the ship in the Thames the two casks had

(z) *Notara* v. *Henderson*, L. R. 5 Q. B. 246; 7 Q. B. 225; 41 L. J. Q. B. 158.

(a) *Notara* v. *Henderson*, L. R. 5 Q. B. 246; *ib.* 7 Q. B. 225; 39 L. J. Q. B. 167; 41 *ib.* 158.

(b) *Laveroni* v. *Drury*, 8 Exch. 170; 22 L. J. Ex. 2; *Kay* v. *Wheeler*, L. R. 2 C. P. 302; 36 L. J. C. P. 180.

(c) *Parry* v. *Roberts*, 3 Ad. & E. 120.

(d) Holt, C. J., 1 Smith's L. C. 5th ed. 181, 182.

been opened and plundered by the crew; and it was held that the very occurrence of the loss was *primâ facie* evidence of negligent keeping on the part of the defendant, and that he was responsible for the loss (*e*). In the contract of a shipowner to carry goods shipped on board his vessel there is an implied condition that the vessel shall be seaworthy (*f*), except as to latent defects.

Limitation of liability by special contract.—There are certain cases, as we shall presently see, where a carrier contracts for the conveyance of very perishable or fragile articles, in which he may accept the goods and contract to carry them on the express terms that he shall not be responsible for damage done to them in the transit (*post*, p. 541). Generally speaking, however, it is not competent to a party to enter into a contract for the performance of a particular duty, and by the same contract to stipulate that he shall be exempt from *all* legal responsibility if he neglects to do what he has undertaken to perform. "We cannot," observes Lord Ellenborough, "construe a contract for the carriage of goods between the owners of vessels carrying goods for hire and the persons putting the goods on board, so as to make the owners say we will not be answerable at all for any loss occasioned by our own misconduct; for this would in effect be saying, 'We will be at liberty to receive your goods on board a vessel, however leaky; we will not be bound to provide a crew equal to the navigation of her; and, if through these defaults the goods are lost, we will pay nothing'" (*g*).

A stipulation in a bill of lading that the shipowner is not to be accountable for leakage or breakage absolves him from responsibility for leakage and breakage the result of mere accident, where no blame is imputable, or for leakage the result of bad stowage, where the shippers have themselves superintended the stowage (*h*), but does not exempt him from the obligation which the law imposes upon him of taking reasonable care of goods entrusted to him to be carried (*i*). And an exception in a bill of lading of "accidents or damage of the seas, rivers, and steam navigation of whatever nature or kind soever," does not protect the shipowner from liability for damage arising from a collision caused

(*e*) *Hodgson* v. *Fullarton*, 4 Taunt. 787; *Hatchwell* v. *Cooke*, 6 Taunt. 577.

(*f*) *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; but see *Schloss* v. *Heriot*, 14 C. B. N. S. 59; 32 L. J. C. P. 211; where the contrary was held (although it was admitted that an action would lie for negligence), and which does not appear to have been cited in *Kopitoff* v. *Wilson*.

(*g*) *Lyon* v. *Mells*, 5 East, 438; *Ellis* v. *Turner*, 8 T. R. 531; see however, *The Ducro*, L. R. 2 A. & E. 293; 38 L. J. Adm. 69.

(*h*) *Ohrloff* v. *Briscall*, L. R. 1 P. C. 231; 35 L. J. P. C. 63.

(*i*) *Phillips* v. *Clark*, 2 C. B. N. S. 164; 26 L. J. C. P. 168; *Czech* v. *The General Steam Navigation Co.*, L. R. 3 C. P. 14; 37 L. J. C. P. 3.

by gross negligence of his ship's master and crew (*k*). An exception of loss by thieves means *primâ facie* persons outside the ship, and not belonging to it (*l*).

Loss by the act of God, dangers and accidents of the seas, rivers, and navigation.—From losses occasioned by the act of God, by the Queen's enemies, and the dangers and perils of the sea and of navigation, the carrier by water is, and always has been, exempt by the common law; but he is not exempt, nor does the exception in the bill of lading or other contract of affreightment exempt him, from accidents occasioned by his own negligence and misconduct or want of skill, or the negligence, misconduct, or want of skill of the persons whom he has entrusted with the navigation of the vessel (*m*). The expression "act of God" denotes natural accidents, such as lightning, earthquake, and tempest, and not accidents arising from the negligence of man. And the term "dangers and accidents of the sea and of navigation" denotes the dangers and accidents peculiar to the ocean and to navigation from port to port, which no human care or skill can guard against, or surmount, such as accidents resulting from the irresistible violence of the winds and waves, and from tides and currents (*n*); the destruction of a perishable cargo or of living animals from the rolling of a ship in a storm (*o*); jettison of goods from irresistible necessity to lighten the ship and save her from foundering (*p*); the grounding of a vessel on the hard and uneven bottom of a dry harbour, in which she had been obliged to take refuge (*q*), or on a sunken rock or sand-bank not generally known, and not marked on the ordinary charts or maps; irresistible attacks by pirates (*r*); the accidental breaking of tackle by which the vessel is moored in port (*s*); or accidental collisions in fogs or storms, where no blame is imputable to either of the vessels striking together (*t*).

When a loss occasioned by negligence or misconduct is not a loss from peril of the sea, though the sea does the mischief.—The general rule in cases of insurance is, that the immediate and not the remote cause of loss is to be considered: but this rule does not apply as between the owner and carrier of goods. Thus, if a vessel deviates from its proper course, and sails unnecessarily through dangerous straits and channels, or into seas infested with pirates, and is wrecked or plundered in consequence of such deviation,

(*k*) *Lloyd* v. *Gen. Iron Screw Col. Co.*, 3 H. & C. 284; 33 L. J. Ex. 269.

(*l*) *Taylor* v. *Liverpool & Great Western Steam Co.*, L. R. 9 Q. B. 546.

(*m*) Mansfield, C. J., 1 Doug. 273; *Siordet* v. *Hall*, 1 M. & P. 561.

(*n*) *Hodgson* v. *Malcolm*, 2 B. & P. N. R. 336.

(*o*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 110.

(*p*) *Bird* v. *Astcock*, 2 Bulst. 280.

(*q*) *Fletcher* v. *Inglis*, 2 B. & Ald. 315.

(*r*) *Pickering* v. *Barclay*, Styles, 132.

(*s*) *Laurie* v. *Douglas*, 15 M. & W. 746.

(*t*) *Buller* v. *Fisher*, 3 Esp. 67.

the loss, though proximately caused by what is usually termed "a peril of the sea," is deemed to have been occasioned by the misconduct of the master or commander, who had improperly gone out of his way to meet the danger. A collision arising from the negligence of the crew of the ship is not a peril of the sea within the meaning of an exception of loss arising from perils of the sea in a bill of lading (z). If the cargo is seriously damaged or destroyed by rats, the loss is not the result of a danger or an accident of the seas, but of neglect and want of care on the part of the master and crew (a). If a vessel becomes unseaworthy, and the owner neglects to avail himself of an opportunity to repair her, and thereby causes the loss of the cargo, the loss is the result of negligence (b). If the vessel at the time of the commencement of the voyage is unseaworthy—if the hull is worm-eaten or gnawed by rats, or the timbers are rotten, and the vessel is shaken to pieces and founders in a gale which a stout and seaworthy ship would have withstood in safety, the loss, though proximately caused by the violence of the winds and waves, has not, in contemplation of law, been occasioned by perils of the seas, but by the negligence and misconduct of the owner of the ship, who is responsible to the owner of the cargo for the loss of the goods shipped on board (c). When, on the other hand, from the rolling and labouring of a ship in a storm a number of horses, though properly stowed and secured on board at the commencement of the tempest, broke loose and kicked each other to death in the hold of the vessel, the loss, though proximately caused by their own hoofs, was deemed to have been occasioned by peril of the sea (d).

"If a ship perish in consequence of striking against a rock or shallow, the circumstance under which that event has taken place must be ascertained in order to decide whether it happened by a peril of the sea, or by the fault of the owner, carrier, or master. If the situation of a rock or shallow is generally known, and the ship is not forced upon it by adverse winds, or storms and tempests, the loss is to be imputed to the fault of the master. And it matters not, in such a case, whether the loss arises from his rashness in not taking a pilot, or from his own ignorance or unskilfulness. On the other hand, if the ship is forced upon such a rock or shallow by adverse winds or tempests, or if the shallow is occasioned by a recent and sudden collection of sand in a place where ships could before sail with safety, or if the rock or shallow is not

(z) *Grill* v. *The General Iron Screw Col. Co.*, L. R. 1 C. P. 600; *ib.* 3 C. P. 476; 35 L. J. C. P. 321; 37 L. J. C. P. 205.

(a) *Laveroni* v. *Drury*, *ante*, p. 495.

(b) *Worms* v. *Storey*, 11 Exch. 430; 25 L. J. Ex. 1.

(c) *Hunter* v. *Potts*, 4 Campb. 202.

(d) *Gabay* v. *Lloyd*, 3 B. & C. 793.

generally known; in all these cases the loss is to be attributed to the act of God, and it is deemed a peril of the sea" (e). If the carrier by water overloads his vessel, and so causes it to founder in a gale of wind, the loss is occasioned by the negligence of man; but it is otherwise, if the boat has not been surcharged, but sinks solely through the violence of the winds and waves (f). If a hoyman shoots a bridge in tempestuous weather or at a dangerous period of the tide, and the hoy is sunk, the loss is occasioned by the negligence of the hoyman; but, if he has shot the bridge at a proper time and in proper weather, but the hoy has been taken aback by a sudden gust of wind, and has been driven against the abutments of the bridge and sunk, and the goods on board lost, the loss is deemed to have been occasioned by the act of God, and the carrier, consequently, is exempt from responsibility in respect thereof (g).

Proof that the loss was occasioned by negligence and not by a peril of the sea.—In order to determine whether the loss has or has not been occasioned by the negligence or want of skill of the servants of the shipowner, "the established rules of nautical practice, the usages and regulations of particular ports and rivers, the state of the wind, the tide, and the light, the degree of vigilance of the master and crew, and all other circumstances bearing upon the conduct and management of the vessel must be considered" (h).

Loss by fire—Limitation of the responsibility of owners and part owners of ships by statute.—By the 17 & 18 Vict. c. 104, s. 503, it is enacted that no owner of any sea-going ship or share therein shall be liable to make good any loss or damage which may happen, without his fault or privity, to any goods or merchandise taken on board such ship by reason of any fire happening on board, or to any gold, silver, diamonds, watches, jewels or precious stones taken on board, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof has at the time of shipping the same inserted in his bills of lading, or otherwise declared in writing to the master or owner of such ship, the true nature and value of such articles (i). And by the 25 & 26 Vict. c. 63, s. 24, the owners of any ship, whether British or foreign (k), shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say:—(1) where any loss of life or personal injury is

(e) Abbott, by Shee, 389, 8th ed.

(f) 22 Assiz. 41; *Williams* v. *Lloyd*, Jones's Rep. 180.

(g) *Amies* v. *Stevens*, 1 Str. 128.

(h) Abbott, *ut sup.* 207; *Tuff* v. *Warman*, 5 C. B. N. S. 573.

(i) The nature of the articles must be described, and their money value stated; *Williams* v. *Afric. St. Ship Co.*, 1 H. & N 302; 26 L. J. Ex. 69.

(k) *The Amalia*, 32 L. J. Adm. 191.

caused to any person being carried in such ship; (2) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board any such ship; (3) where any loss of life or personal injury is by reason of the improper navigation of such ship as aforesaid caused to any person carried in any other ship or boat (*l*); (4) where any loss or damage is, by reason of the improper navigation of such ship as aforesaid, caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever on board any other ship or boat—be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage. By the 17 & 18 Vict. c. 104, s. 516, nothing contained in the Act is to take away any liability to which any master or seaman, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman.

The limitation of liability under the Act of 1854 does not extend to the owner of any lighter, barge, boat, or vessel, used solely in rivers or inland navigation, or to any ship or vessel not duly registered (*m*). The Acts, it will be seen, embrace two descriptions of losses, the one a loss or damage to the cargo laden on board the ship occasioned by the negligence of the master or mariners, and rendering the shipowner liable, *ex contractu*, at common law to the extent of the value of such cargo; and the other a loss or damage to the ship or cargo of some third party, occasioned by the negligence or misconduct of the master, in respect of which the owner is liable *ex delicto*, but not upon any contract. To an action *ex delicto* in respect of an injury to the property of a third party, both the shipowner and the master are liable—the owner, as the employer, responsible for the wrongful act done by the servant in the course of his employment, and the other as the party actually committing the injury; and it is this liability *ex delicto* to which the Act of 1854 refers, when it provides that nothing therein contained shall lessen or take away any responsibility to which any master or mariner might then by law be liable, notwithstanding such master or mariner might be an owner or part owner of his ship or vessel. If the master be a

(*l*) As to the mode of procedure in case of loss of life or personal injury, see the 17 & 18 Vict. c. 104, ss. 507-512.

(*m*) *Morewood* v. *Pollok*, 22 L. J. Q. B. 250; 1 Ell. & Bl. 743.

part owner, his responsibility, if he is sued (*ex delicto*) in his character of master, and not as one of several part owners, will not be limited by the Act; but, if he is sued as one of the part owners with the other part owners, the circumstance of the loss being occasioned by his fault, and with his privity, will not take away from the other part owners the protection which the statute intended to give them (*n*). If the ship is sunk by a collision with another vessel, the shipowner is not released from liability by the loss of his vessel (*o*).

Losses occasioned by the negligence of licensed pilots.—The 17 & 18 Vict. c. 104, s. 388, further exempts the owner and master of a ship from liability in respect of losses or damage occasioned by the neglect or incapacity of a licensed pilot in charge of the vessel. "The shipowners are not responsible when they take a pilot by compulsion; but in all other cases they are responsible for the acts of the pilot" (*p*). "It is the duty of the master to look after the pilot in the case of his palpable incompetency, or intoxication, or of the loss of his faculties. The taking of a pilot under the Act does not relieve the shipowner from the ordinary legal consequences resulting from the negligence of the master and crew" (*q*).

Delivery of goods by shipowners.—There is an implied engagement on the part of every undertaker of the work of carrying, to proceed by the usual and ordinary course to the port of destination or place of delivery without delay, and without unnecessary deviation (*r*). If it is customary for the carrier by water to carry merely from port to port, or from wharf to wharf, and for the owner or consignee to fetch the goods from the vessel itself, or from the wharf, as soon as the arrival of the ship has been reported, the carrier must give such owner or consignee notice of the arrival of the goods on board, or at the customary place of destination, in order to discharge himself from further liability as a carrier. He cannot at once discharge himself from all responsibility by immediately landing the goods without any notice to the consignee, but is bound to keep the goods on board or on the wharf, at his own risk, for a reasonable time, to enable the consignee or his assigns to come and fetch them (*s*). The Merchant

(*n*) Bayley, J., *Wilson* v. *Dickson*, 2 B. & Ald. 13.

(*o*) *Brown* v. *Wilkinson*, 15 M. & W. 391; 16 L. J. Ex. 34; *The Mellona*, 12 Jur. 271.

(*p*) *The Energy*, L. R. 3 A. & E. 48; 39 L. J. Adm. 25; *The Ocean Wave*, L. R. 3 P. C. 205; *The Calabar*, L. R. 2 P. C. 238; *The Lion*, L. R. 2 P. C. 525; 38 L. J. P. 57.

(*q*) Dr. Lushington, *The Eden*, 10 Jur. 298; *The Duke of Manchester*, 10 Jur. 863; *The Iron Duke*, 9 Jur. 476; *The Iona*, L. R. 1 P. C. 4, 26; *The Velasquez*, L. R. 1 P. C. 494; 36 L. J. Adm. 19; *The Queen*, L. R. 2 A. & E. 354; 38 L. J. Adm. 39.

(*r*) *Davies* v. *Garrett*, 4 M. & P. 540; 6 Bing. 716.

(*s*) *Bourne* v. *Gatliff*, 3 Sc. N. R. 44; 8 ib. 604; 11 Cl. & Fin. 45.

Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63, ss. 67, *et seq.*), empowers the shipowner to enter and land goods in default of entry and landing by the owner; and, notwithstanding the landing, the shipowner may, by giving notice for that purpose, preserve his lien for freight. After part of the goods have been landed by the shipowner, the consignee may interfere and claim the remainder, if the shipowner can deliver the remainder to him without any further loss or injury than would have been the case if the consignee had been ready before any of the goods were discharged (*t*). The Act also provides for the sale of the goods, if they are not claimed by the owner (*u*).

Losses on board lighters conveying goods from the ship to the shore.—When the vessel is not able to discharge at a wharf, but the goods are placed in lighters to be conveyed from the ship to the shore, and are lost on their passage through the neglect or want of skill of the lighterman, the loss will fall on the owner of the goods, if the lighterman is paid and employed by him (*x*); but, if he is employed and paid by the shipowner or carrier, he is then the servant of the latter, expediting the goods in the further prosecution of the voyage to their place of destination, and the carrier, consequently, must make good the loss. Generally speaking, the task of discharging the cargo in the port of London is accomplished through the medium of public lightermen, whose lighters are entered at Waterman's Hall, and who are public officers employed and paid by the merchants and owners of the goods. The lightermen are responsible, in their character of common carriers, to the merchant who employs them; and the shipowner is discharged as soon as the goods have been safely loaded on board such lighters. But he is not, by the custom of the river Thames, exonerated from liability until the loading is complete; and he is not discharged from his obligation to guard the portion of the cargo that has been placed in the lighter, by telling the lighterman that he has not sufficient hands on board to take care of it. He is, on the other hand, bound to take care of the lighter and its contents until it is fully laden, and is ready to leave the side of the ship (*y*). The protection afforded by the 17 & 18 Vict. c. 104, s. 503 (*ante*, p. 499), to owners of sea-going vessels in respect of loss or damage by fire to goods or merchandise shipped on board, does not extend to the case of a fire happening on board lighters

(*t*) *Wilson* v. *London, Italian, and Adriatic Steam Nav. Co.*, L. R. 1 C. P. 61; 35 L. J. C. P. 9.

(*u*) *Beresford* v. *Montgomerie*, 17 C. B. N. S. 379; 34 L. J. C. P. 41; *Wilson* v. *London, Italian, and Adriatic Steam Nav. Co.*, 35 L. J. C. P. 9; L. R. 1 C. P. 61.

(*x*) *Sparrow* v. *Carruthers*, 2 Str. 1236; *Strong* v. *Natally*, 4 B. & P. 16–19.

(*y*) *Catley* v. *Wintringham*, 1 Peake, 202; *Robinson* v. *Turpin*, *ib.* 203, n. (a).

employed by the shipowner in carrying goods from the shore to be laden on board the vessel (z). Therefore, if goods are set on fire by reason of the negligence of such lightermen, the shipowners are responsible for the damage.

Payment of the freight or hire.—If a charter-party amounts to a demise of the ship to the charterer for a certain term at a certain hire, and the vessel is bailed to him pursuant to the contract, he is responsible for the payment of the hire at the expiration of the term of hiring, although the vessel may have been lost; but, if the shipowner merely grants the use of the vessel, retaining the possession of it through the medium of his own seamen and servants, the shipowner loses his right to the hire, at the same time that the charterer is deprived of the use and enjoyment of the vessel. When the charter-party amounts merely to a contract by the shipowner or shipmaster for the conveyance of merchandise to a specified destination, the fulfilment of the covenant or undertaking to carry the goods, or the shipowner's readiness and willingness to fulfil it, is a condition precedent to the payment of the hire, so that the plaintiff must of necessity show the work done, or that he was ready and willing to do it, and was hindered from doing it by the defendant, before he can demand the money (a). Ordinarily, the right to the freight does not arise until the goods are not only conveyed to their destination, but also delivered (b); or, in the case of a charter-party, until the charterers have had the full use of the ship for the purposes for which they chartered it (c). The freight may, however, by the special contract of the parties, be made payable on the delivery of the goods on board (d), on the sailing (e), or on the final sailing of the vessel from the port of loading (f) prior to the performance of the voyage, or at any other period of time which they may choose to appoint; but, in all cases of doubtful construction, the courts will adhere to the maxim that the freight is not due until it has been earned by the performance of the work for which it is to be paid (g). Where part of the cargo was justifiably sold for repairs before arrival at the port of destination, and sold for more than it would fetch at the

(z) *Morewood* v. *Pollok*, 22 L. J. Q. B. 250; 1 Ell. & Bl. 743.

(a) *Tate* v. *Meek*, 2 Moore, 291; *Campion* v. *Colvin*, 3 Sc. 350; 3 Bing. N. C. 17; Pothier, *Traité de la chartre-partie*, part 1, s. 3 s. 2; *Cleary* v. *M'Andrew*, 2 Moo. P. C. N. S. 216; *The Soblomsten*, L. R. 1 Adm. 293; 36 L. J. Adm. 5.

(b) *Cato* v. *Irving*, 5 De G. & S. 210, 224; 21 L. J. Ch. 675.

(c) *Brown* v. *Tanner*, L. R. 3 Ch. 597; 37 L. J. Ch. 923.

(d) *Andrew* v. *Moorhouse*, 5 Taunt. 438; 1 Marsh. 122; *De Silvale* v. *Kendall*, 4 M. & S. 42; *Allison* v. *Bristol Marine Ins. Co.*, 1 Ap. Cas. 209.

(e) *Thompson* v. *Gillespy*, 5 Ell. & Bl. 209; 24 L. J. Q. B. 340; *Hudson* v. *Bilton*, 6 Ell. & Bl. 565; 26 L. J. Q. B. 27.

(f) *Roelandts* v. *Harrison*, 9 Exch. 444; 23 L. J. Ex. 169.

(g) *Mashiter* v. *Buller*, 1 Campb. 84; Abbott, C. J., *Manfield* v. *Maitland*, 4 B. & Ald. 585; *Vlierboom* v. *Chapman*, 13 M. & W. 230.

port of destination, and the proceeds paid to the charterer, it was yet held that freight could not be claimed in respect of such part of the cargo (*h*). Where the freight was to be paid "within three days after the arrival of the ship and before delivery of any portion of the goods," and the ship arrived in port, but was sunk and the goods destroyed within the three days, it was held that the freight was not payable (*i*). If freight is paid in advance and the cargo is lost, the freight so paid cannot be recovered back (*k*), unless the loss has been occasioned by negligence, or misconduct, or want of skill in the navigation of the vessel. If by the occurrence of an accident on the voyage delay is occasioned, the master may claim a reasonable time to carry on the cargo, either in the same ship when repaired, or by transhipping it into another vessel (*l*).

When the use of the entire vessel is bargained for (*m*), and the charterer covenants or agrees to provide and ship a full cargo, and pay freight therefor at so much a ton, and the shipowner sends out the vessel, the circumstance that the lading has been prevented by some unforeseen cause or inevitable accident does not release the charterer from his contract. And, when the goods have been shipped on board, the charterer cannot abandon them and refuse to pay the freight on the ground that they have been damaged or destroyed by perils of the sea (*n*), or by the fault of the master and crew (*o*); nor can he deduct from the freight the value of missing articles (*p*). When the charterer merely covenants to pay freight at the rate of so much a ton, etc., for the goods actually shipped on board, and does not covenant to furnish any particular quantity of goods, he is only liable for the quantity of goods actually shipped; but, if he contracts for the use of the entire ship, or part of a ship, or for a certain specified tonnage, the payment of freight must be proportioned to the amount of tonnage space, or accommodation he has contracted for. If he covenants to ship on board a full and complete cargo, and to pay so much a ton for every ton loaded on board, he is bound to put on board and to pay freight for as much as the ship will hold and safely carry, whatever may be the amount of the burthen and tonnage of

(*h*) *Hopper* v. *Burness*, 1 C. P. D. 137.

(*i*) *Duthie* v. *Hilton*, L. R. 4 C. P. 138; 38 L. J. C. P. 93.

(*k*) *Saunders* v. *Drew*, 3 B. & Ad. 450; *Byrne* v. *Schiller*, L. R. 6 Ex. 319; 40 L. J. Ex. 177; *Allison* v. *Bristol Marine Ins. Co.*, *supra*. This is contrary to the law in other European countries and in America. *Byrne* v. *Schiller*, *supra*.

(*l*) *Cleary* v. *M'Andrew*, 2 Moo. P. C. N. S. 216.

(*m*) As to putting cargo in the cabin, see *Mitcheson* v. *Nicol*, 7 Exch. 929; and on deck, see *Neill* v. *Ridley*, 9 Exch. 680.

(*n*) Abbott on Shipping, 380, 381.

(*o*) *Dakin* v. *Oxley*, 15 C. B. N. S. 646; 33 L. J. C. P. 115.

(*p*) *Meyer* v. *Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289.

the vessel mentioned in the charter-party. A misdescription of the ship's burthen does not in such a case exonerate the charterer from the liability to ship on board, and to pay freight for, a full and complete cargo, provided the charterer has had an opportunity of examining the ship, and forming his own judgment of her capacity, and there has been no fraudulent misrepresentation or concealment of the truth (*q*). Although the charterer has taken the whole ship, and covenanted to provide and put on board, and pay freight for, a "full and complete cargo," yet the shipowner may take on board merchandise as ballast, provided it occupies no larger space than the ballast would have done, and does not interfere with the proper shipment and carriage of the cargo (*r*).

Calculation of the freight.—When freight is covenanted to be paid at the rate of so much per ton the freight is to be calculated and paid on that quantity alone which is put on board, carried throughout the whole voyage, and delivered, at the end of it, to the merchant. If, therefore, a cargo of corn increases in bulk and weight during the voyage, or after the cargo is taken out of the vessel, the freight is payable only on the quantity actually shipped on board, and not on the increased quantity delivered; for such a cargo may be increased in bulk and deteriorated in quality by the negligence of the master and crew during the voyage (*s*).

Payment pro ratâ.—If the covenant or agreement of the shipowner or master be entire for the conveyance of a full cargo of merchandise for a specific sum, the charterer is not bound to accept and pay for half a cargo; but, if the charterer loads less than a full cargo, or if part of the cargo is lost without any default on the part of the shipowner, the whole of the sum is payable (*t*). And, if he agrees to pay by the bale or cask, or at the rate of so much a ton, he is bound to accept and pay for what has been actually brought and tendered to him (*u*). He must pay, also, in all cases, for such goods as he actually accepts; and, if he voluntarily accepts goods short of the port of destination, so as to raise an inference that further carriage of the goods was dispensed with (*x*), he is liable upon an implied contract to pay *pro râta itineris peracti.* This apportionment usually happens when the ship, by reason of some disaster, goes into a port short of the place

(*q*) *Hunter* v. *Fry*, 2 B. & Ald. 424; *Thomas* v. *Clarke*, 2 Stark. 450; *Barker* v. *Windle*, 6 Ell. & Bl. 675.

(*r*) *Towse* v. *Henderson*, 4 Exch 893.

(*s*) *Gibson* v. *Sturge*, 10 Exch. 622; 24 L. J. Ex. 121; *Buckle* v. *Knoop*, L. R. 2 Ex. 125, 333; 36 L. J. Ex. 49, 223.

(*t*) *Robinson* v. *Knights*, L. R. 8 C. P. 465; 42 L. J. C. P. 211; *The Norway*, 3 Moo. P. C. N. S. 245; *Merchant Shipping Co.* v. *Armitage*, L. R. 9 Q. B. 99; *Blanchet* v. *Powell's Llantwit Coll. Co.*, L. R. 9 Ex. 77

(*u*) *Christy* v. *Row*, 1 Taunt. 314; *Ritchie* v. *Atkinson*, 10 East, 295, 310.

(*x*) *The Soblomsten*, L. R. 1 Adm. 293; 36 L. J. Adm. 5, but as to when this inference arises see *Metcalfe* v. *Britannia Iron Works Co.*, 1 Q. B. D. 613; 2 Q. B. D. 423 C. A.

of destination, and is unable to prosecute and complete the voyage (*y*). The shipowner is not entitled to freight *pro ratâ* where goods have been sold on the voyage at an intermediate port without leave from the owners, where such leave was obtainable (*z*).

Time freight.—When the charterer engages to pay so much per month, week, or day of the voyage, or of the ship's employment, and no time is fixed for the commencement of the computation, his liability to the freight will begin on the day that the ship breaks ground and commences the voyage. and will continue during all unavoidable delays for provisions, repairs, &c., not occasioned by the negligence or misconduct of the master or owners (*a*). The month is always understood to be a calendar, and not a lunar month (*b*); and the freight becomes due in general at the expiration of each month, or other interval of time limited by the parties for its payment, whether the ship does or does not ultimately arrive at her place of destination. But, where the freighter covenanted to pay freight for a vessel at so much a ton per month until her final discharge, so much of such freight as might be earned at the time of the arrival of the ship at her first destined port abroad to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods, it was held that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover *any* freight (*c*).

Shipowner's lien for the freight—Payment of freight by the consignee.—If the shipowners have by the charter-party divested themselves of the possession of the vessel in favour of the charterer, they have, of course, no lien upon the goods shipped on board, and cannot take possession of them and detain them as a security for the rent or hire agreed to be paid for the use of the vessel (*d*). But, if the charter-party does not amount to a bailment of the ship, but the shipowners keep possession of the vessel, and contract merely to carry merchandise for the charterer for certain freight, the delivery of the goods and the payment of the freight constitute mutual conditions to be performed at the same time, so that the shipowner may retain the cargo until he is tendered payment of the freight (*e*). When, however, by the terms of the contract, credit is given for the payment of the freight, as, for instance, if it

(*y*) *Vlierboom* v. *Chapman*, 13 M. & W. 239.
(*z*) *Acatos* v. *Burns*, 3 Ex. D. 282, C. A.
(*a*) *Havelock* v. *Geddes*, 10 East, 566; *Ripley* v. *Scaife*, 5 B. & C. 169.
(*b*) *Jolly* v. *Young*, 1 Esp. 186.
(*c*) *Gibbon* v. *Mendez*, 2 B. & Ald. 17; *Smith* v. *Wilson*, 1 East, 437.
(*d*) *Hutton* v. *Bragg*, 7 Taunt. 14.
(*e*) *Saville* v. *Campion*, 2 B. & Ald. 503; *Campion* v. *Colvin*, 3 Sc. 388; 3 Bing. N. C. 17; *Tate* v. *Meek*, 2 Moore, 293; *Paynter* v. *James*, L. R. 2 C. P. 348.

is to be paid a month or three months after the arrival of the ship, the carrier must forthwith deliver the goods, and rely on the subsequent performance by the charterer of his contract to pay (*f*); and, if the latter becomes bankrupt prior to the arrival of the vessel at the port of destination, the indorsee of the bill of lading is entitled to demand the goods, and the shipowners cannot claim any lien upon them for freight (*g*). If the master does not think fit to insist on his right of detention, but delivers the goods to the consignee, and the latter afterwards refuses to pay the freight, or pays the master by a bill of exchange which turns out to be worthless, the master may resort to the consignor or shipper for payment (*h*), unless he has for his own convenience and accommodation preferred a bill when he might have had cash (*i*). Payment to the shipowners on their demand is a discharge against any claim by the master; and, on the other hand, payment to the master, in the absence of any notice from the owners to withhold it, is a valid payment as against them (*k*). The consignee is *primâ facie* the owner of the goods, and as such is liable for the freight; but, if he be not the owner, he is not liable for freight simply as consignee, except on a new contract to pay the freight. If the goods have always been delivered on payment of freight by the defendant, that is reasonable evidence that in the particular case he agreed to pay the freight (*l*).

Of the liability for freight resulting from the acceptance of goods under bills of lading.—It has been held that, if a person receives goods under a bill of lading in which it is expressed that the goods are to be delivered to him, he paying freight, he, by implication, agrees to pay freight (*m*). The law does not, however, imply any contract for the payment of the freight from the delivery and acceptance of less than the whole cargo (*n*), or from the mere fact of the acceptance of the goods; but it is for a jury to say whether the acceptance, coupled with the particular terms of the bill of lading under which the goods were received, establishes the existence of a contract on the part of the consignee to pay the freight (*o*). The words "he paying freight" are not essential, "freight for the said goods" are sufficient (*p*). Though freight

(*f*) *Alsager* v. *St. Kath. Dock Co.*, 14 M. & W. 794; 15 L. J. Ex. 34.

(*g*) *Tamvaco* v. *Simpson*, L. R. 1 C. P. 363; 35 L. J. C. P. 196.

(*h*) *Tapley* v. *Martens*, 8 T. R. 453; *Shepard* v. *De Bernales*, 13 East, 572; *Dowcett* v. *Beckford*, 5 B. & Ad. 521.

(*i*) *Strong* v. *Hart*, 6 B. & C. 160.

(*k*) *Smith* v. *Plummer*, 1 B. & Ald. 575; *Atkinson* v. *Cottesworth*, 3 B. & C. 648.

(*l*) *Coleman* v. *Lambert*, 5 M. & W. 505.

(*m*) *Cock* v. *Taylor*, 13 East, 403; *Wilson* v. *Kymer*, 1 M. & S. 157; *Bell* v. *Kymer*, 5 Taunt. 477; *Gumm* v. *Tyrie*, 33 L. J. Q. B. 97; 34 *ib.* 124; 6 B. & S. 299.

(*n*) *Young* v. *Moeler*, 5 Ell. & Bl. 762; S. C. nom. *Möller* v. *Young*, 25 L. J. Q. B. 94.

(*o*) *Zwilchenbart* v. *Henderson*, 9 Exch. 722; 23 L. J. Ex. 234.

(*p*) *Wegueliu* v. *Cellier*, L. R. 6 H. L. 286.

may not be payable in respect of a man's own goods conveyed in his own ship, yet it becomes so if he makes third persons consignees of the goods under the bill of lading (*q*). If the consignee receives the goods without any disclaimer of his liability, and there is no reference on the face of the bill of lading to any charter-party whereby the consignor has contracted to pay the freight, the presumption is that the consignee has agreed to pay it; but, when the bill of lading provides for the payment of the freight as per charter-party, and the consignor has contracted by such charter-party for the payment of the freight, it does not necessarily follow that the consignee, by accepting the goods under the bill of lading, has himself contracted to pay it, although he is generally considered so to do. The contract for the payment of the freight inserted in the charter-party does not run with the property in the goods, and is not transferred with it so as to throw the burthen of performance upon the parties into whose hands the goods come by indorsement of the bill of lading. But it has been so much the practice for the indorsee of the bill of lading to pay the freight which the consignor or charterer has, by the charter-party, contracted with the shipowner to pay, that the acceptance of the goods by such indorsee without any disclaimer of his liability is evidence of a new contract and a new agreement for the payment of the freight mentioned therein, the consideration for which is the delivery of the goods to him at his request (*r*); and, if such new contract is established, the remedy for the freight on the bill of lading against the consignee or his assignee co-exists with the remedy against the original consignor or charterer upon the charter-party (*s*). Where a charter-party, stipulating for freight in a lump sum of 2,800*l*. in full of all charges, contained the following clause, "The captain to sign bills of lading at any rate of freight without prejudice to this charter," it was held that, so long as the goods shipped remained the property of the charterers or of their agents, they were liable to the lump freight, and the shipowners had a lien for it, but that the shipowners might be bound to deliver the goods to a *bonâ fide* holder for value of the bill of lading upon payment of the freight mentioned in the bill of lading (*t*). The master has no authority to draw bills of lading making the freight payable otherwise than to the owner (*u*). If the amount of the freight is specified on the face of the bill of lading, it is in general conclusive between the parties (*x*). Where

(*q*) *Weguelin* v. *Cellier*, *supra*.
(*r*) *Sanders* v. *Vanzeller*, 4 Q. B. 295; *Kemp* v. *Clark*, 12 Q. B. 647.
(*s*) *Christy* v. *Row*, 1 Taunt. 300; *Shepard* v. *De Bernales*, 13 East, 565.
(*t*) *Gledstanes* v. *Allen*, 12 C. B. 202.
(*u*) *Reynolds* v. *Jex*, 34 L. J. Q. B. 251.
(*x*) *Foster* v. *Colby*, 3 H. & N. 715; 28 L. J. Ex. 81; *Shand* v. *Sanderson*, 4 H. & N. 389; 28 L. J. Ex. 278.

therefore a mere nominal rate of freight was provided to be paid by the bill of lading, the shipowner being also owner of the cargo, it was held that a subsequent mortgagee of the ship and freight could not charge the assignee of the bill of lading the current rate of freight, but was confined to the nominal freight specified on the face of the bill of lading (*y*). If the receiver of the goods appears on the face of the bill of lading to be an agent acting on behalf of a known principal who is the consignee, the principal and not the agent is then liable for the freight (*z*). But, if the agency is undisclosed, and the principal has given the agent no authority to pledge his credit for the payment of the freight, and the goods never reach the hands of the principal, the latter cannot be made responsible for the amount of the freight (*a*); and the agent who actually received the goods under the bill of lading is then the party to be proceeded against (*b*). If the consignee of goods indorsed the bill of lading to A. with the words "looking to him for all freight, dead freight and demurrage; without recourse to us," and the shipowner accepted the indorsement, and in pursuance of it delivered the goods to A., the consignee is exonerated from liability for freight (*c*); but the consignee, at all events where A. is his agent, is bound to prove an assent on the part of the shipowner discharging him from liability; and he does not prove such an assent by showing that the indorsement was on the bill when presented to the captain without also showing that the captain in fact assented to it (*d*). Where a bill of lading represented the freight of goods to have been paid, when in fact it had not been paid, it was held by the court that, though such representation was not conclusive as between the shipper of the goods and the shipowner, yet, as against an indorsee for value of the bill of lading without notice, the freight must be held to have been paid (*e*).

Where, by the terms of the charter-party, the ship is let for a particular voyage, and the charterers are to pay the shipowners a lump freight for the whole voyage, and the master, at the request of the charterers, is to make bills of lading at any rate and payable in any manner the charterers may choose, without prejudice to the charter, this gives to the charterers the direct management as to the terms on which the bills of lading are to be signed. And, when it is once shown that the master was in fact acting for the charterers, and this is made known to the

(*y*) *Brown* v. *North*, 8 Exch. 1; 22 L. J. Ex. 49.

(*z*) *Amos* v. *Temperley*, 8 M. & W. 805.

(*a*) *Tobin* v. *Crawford*, 9 M. & W. 718.

(*b*) *Dougal* v. *Kemble*, 3 Bing. 383; 11 Moore, 250.

(*c*) *Lewis* v. *McKee*, L. R. 2 Ex. 37.

(*d*) *Lewis* v. *McKee*, L. R. 4 Ex. 58.

(*e*) *Howard* v. *Tucker*, 1 B. & Ad. 712; *Kirchner* v. *Venus*, 12 Moore, P. C. 399.

shippers, the charterers are entitled to recover the freight under the general authority which the shipowners have conferred upon them (*f*).

Stipulated payments in lieu of freight extinguishing the right of lien.—When it is stipulated that a certain specified sum of money shall be paid in respect of goods shipped on board a particular vessel within a certain specified period after the sailing of the vessel, whether the goods shall then have been conveyed to their place of destination or not, or whether they shall ever be so conveyed or not, and to secure this arrangement the amount is made payable by the shipper, the sum stipulated to be paid is not freight, but a payment in lieu of freight. In this case there is no lien upon the goods to secure the payment, neither the consignee nor his goods being liable for the payment of the sum stipulated to be paid, which is held to be not freight, but a remuneration for receiving the goods with a qualified contract for conveying them, and not a reward for actual conveyance (*g*). But parties who have by special contract superseded the rights and obligations which the law attaches to freight in its legal sense may, if they think fit, create a lien on the goods for the performance of the agreement into which they have entered; and they may do this, either by express conditions contained in the contract itself, or by agreeing that, in case of failure of performance of that agreement, the right of lien for what is due shall subsist as if there had been an agreement for freight; and the usage of the place where the contract was made may be annexed to the contract so as to create a lien, provided both parties were cognizant of the usage at the time they made their contract (*h*).

Payment of demurrage on charter-parties and bills of lading.—Where the charter-party is silent as to the time to be occupied in the discharge, the contract implied by law is that each party will use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls upon him; and there is no implied contract by the shipowner to allow his vessel to be kept there the usual time, if, by reasonable diligence on the part of the merchant, the cargo might be sooner taken away; and no implied contract by the merchant to take the cargo out within such usual time, if he could not by reasonable diligence do so. The contract implied is that each should use reasonable dispatch in performing his part. Where, therefore, delay happens without fault on either

(*f*) *Marquand* v. *Banner*, 6 Ell. & Bl. 245; 25 L. J. Q. B. 313; *Kern* v. *Deslandes*, 10 C. B. N. S. 205; 30 L. J. C. P. 297.

(*g*) *How* v. *Kirchner*, 11 Moore, P. C. 25.

(*h*) *Kirchner* v. *Venus*, 12 Moore, P. C. 398; *Fisher* v. *Smith*, 4 Ap. Cas. 1.

side, the loss must remain where it falls (*i*). The charterer usually covenants or promises to load or unload the vessel within a certain time, or, if he fails so to do, to pay so much *per diem* during the delay. This payment, as well as the delay itself, is called in mercantile and legal phraseology, demurrage. The charterer cannot escape from liability upon his express covenant or promise to pay demurrage, by showing that the delay was occasioned by some unforeseen event not provided for by the contract, such as the delays of other consignees in unloading (*k*), the crowded state of the docks, the delays of Custom-house officers, or the inclemency of the weather (*l*), or bad weather (*m*), or even a permanent obstacle (*n*), or the neglect of the holders of the bill of lading to present it and claim the goods (*o*). But, if the delay is occasioned by the wrongful and unauthorised interference of the shipowner himself with the unloading of the cargo, the detention is not then the detention of the charterer, and the shipowner cannot claim demurrage in respect thereof (*p*). When a port is named in the charter-party as the port to which the vessel is to proceed, the lay days do not commence upon the arrival of the vessel in the port, but upon her arrival at the usual place of loading in the port, not the actual berth at which she loads, but the dock or roadstead where loading usually takes place (*q*). If when she arrives there the place is so crowded that she cannot load, the loss must fall on the charterer; the shipowner has done all he was required to do when he has taken his vessel to the usual place of loading in the port (*r*), and he is not bound to wait an unreasonable time till the port is cleared (*s*). A stipulation that the vessel shall proceed to A., and there load a cargo "in the usual and customary manner," applies to the mode of loading, whether by a lighter or at the wharf, and not to the place to which the shipowner undertakes that the ship shall proceed (*t*). Where a charter-party provided that the cargo should be "discharged with all dispatch according to the custom of the port," and the custom was to unload by lighters in turn, and delay arose while waiting for the turn, it was held the jury were

(*i*) *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; 5 Q. B. 544; 39 L. J. Q. B. 188; *Cuningham* v. *Dunn*, 3 C. P. D. 443, C. A.

(*k*) *Straker* v. *Kidd*, 3 Q. B. D. 223; *Porteus* v. *Watney*, 3 Q. B. D. 534.

(*l*) *Blight* v. *Page*, 3 B. & P. 295, n. *Barret* v. *Dutton*, 4 Campb. 333.

(*m*) *Thiis* v. *Byers*, 1 Q. B. D. 244.

(*n*) *Dahl* v. *Nelson*, 12 Ch. D. 568; 6 Ap. Cas. 38.

(*o*) *Erichsen* v. *Barkworth*, 3 H. & N. 894; 28 L. J. Ex. 95.

(*p*) *Benson* v. *Blunt*, 1 Q. B. 870.

(*q*) *Tapscott* v. *Balfour*, *infra*; see, however, *Davies* v. *McVeagh*, 4 Ex. D. 265, C. A.; *Dahl* v. *Nelson*, 12 Ch. D. 568; 6 Ap. Cas. 38.

(*r*) *Tapscott* v. *Balfour*, L. R. 8 C. P. 46; 42 L. J. C. P. 16; *Ashcroft* v. *Crow Colliery Co.*, L. R. 9 Q. B. 540.

(*s*) *Dahl* v. *Nelson*, 6 Ap. Cas. 38.

(*t*) *Tapscott* v. *Balfour*, *supra*. See *Kay* v. *Field*, 8 Q. B. D. 594, the mode of loading may be connected with the place of loading; *Coverdale* v. *Grant*, 8 Q. B. D. 600.

rightly directed, that if the defendants had used the existing means at the port with reasonable dispatch, according to the custom, the jury were to find for the defendants (*u*). When neither the shipowner nor the charterer is to blame for delay, the number of days runs from the time when the ship is in a dischargeable state; and, if no period is mentioned, the cargo is to be discharged in a reasonable time, to commence from the time when the ship is in a state to begin delivering (*v*). Where £5 *per diem* demurrage was stipulated to be paid, "to reckon from the time of the vessel being ready to unload, and in turn to deliver," it was held that the words "in turn to deliver" applied to the public rules and regulations of the port of discharge, and that the charterers were not liable for the payment of demurrage until their "turn to deliver" had come, in conformity with the regulations of the port (*x*). If, after the loading has been completed, the vessel is detained by a sudden frost (*y*), or by foul weather and contrary winds, no right to demurrage arises by reason of such detention (*z*).

The days mentioned in the clause of demurrage are understood, it is said, by the custom of the port of London, to be working days, and do not, consequently, include Sundays and Custom-house holidays (*a*). There does not, however, appear to be any general custom to this effect (*b*). The lay days allowed are, moreover, to be reckoned from the time of the ship's arrival at the usual place of discharge, and not from her arrival at the entrance of the port, although for the purposes of navigation she may have discharged a portion of her cargo at the entrance of the port (*c*). It is competent for the consignee to show that there is a custom at the port of unloading that the lay days commence at some particular period (*d*). If the parties, by mutual consent, substitute a new port for the port mentioned in the contract of affreightment, the freighter will be entitled to the lay days, and the shipowner to the demurrage, stipulated for by the original contract (*e*). In the case of demurrage, a fraction of a day counts as a day (*f*). If a consignee accepts goods under a bill of lading, at the bottom of which

(*u*) *Postlethwaite* v. *Freeland*, 4 Ex. D. 155; 5 Ap. Cas. 599.

(*v*) *Brown* v. *Johnson*, 1 Car & Marsh. 440; 10 M. & W. 331.

(*x*) *Robertson* v. *Jackson*, 2 C B 412; 15 L. J. C. P. 28; *Taylor* v. *Clay*, 9 Q. B. 713; *Leidemann* v. *Schultz*, 14 C B. 51; 23 L. J. C. P. 17; but see *Lawson* v. *Burness*, 1 H. & C. 396.

(*y*) *Pringle* v. *Mollett*, 6 M. & W. 83.

(*z*) *Jamieson* v. *Laurie*, 6 Bro. P. C. 474.

(*a*) *Cochran* v. *Retberg*, 3 Esp. 121; where "dispatch-money" was to be paid on any time saved in loading, 10*s*. per hour, and nine days were saved, it was held that these days were 24 hours each, not twelve, *Laing* v. *Holloway*, 3 Q. B. D. 437.

(*b*) *Brown* v. *Johnson*, 10 M. & W. 334.

(*c*) *Brereton* v. *Chapman*, 7 Bing. 559; *Kell* v *Anderson*, 10 M. & W. 498; *Bastifell* v. *Lloyd*, 1 H. & C. 388; 31 L. J. Ex. 113.

(*d*) *Norden Steamship Co.* v. *Dempsey*, 1 C. P. D. 654.

(*e*) *Jackson* v. *Galloway*, 6 Sc. 792.

(*f*) *Commercial Steamship Co.* v. *Boulton*, L. R. 10 Q. B. 346.

is a memorandum, to the effect that the ship is to be cleared within a certain time, and that demurrage, at the rate of so much *per diem*, is to be paid after that day, he will be liable for the payment of such demurrage, and may be sued therefor by the master (*g*); but he is not responsible to the master for demurrage if no such clause is contained in the bill of lading (*h*), or if the delay is caused by the master's improperly refusing to deliver the whole cargo (*i*). Where, by the bill of lading, the vessel is to be unloaded in her regular turn, the consignor is liable for her detention beyond her regular turn, although there is no express contract for demurrage in the bill of lading (*k*).

Where the phrase in the charter-party is general, viz., "the charterer's liability to cease when the cargo is shipped," this includes all liability as well past as future (*l*); but where the clause was that the liability should cease "as soon as the cargo is shipped, loading excepted," it was held that the charterer was liable for delay in loading (*m*). Where the stipulation is that the ship is to be brought to a particular place, "or as near thereto as she may safely get," this refers to any permanent obstacle as well as to anything endangering her safety (*n*).

It is not unusual for the charter-party to give the shipowner a lien on the cargo for demurrage, and to provide that the charterer's responsibility is to cease on shipment of the cargo. Such an agreement is, of course, binding, and, if that is the intention of the parties as collected from the instrument, will relieve the charterer from responsibility for demurrage at the port of loading as well as at that of discharge (*o*). But such a construction should not be adopted, unless the intention of the parties is quite clear; for the safer and juster conclusion in the case of doubt is that it absolves the charterer, when once cargo of sufficient value is on board, from all liabilities, which, but for it, he might incur in respect of anything happening after the sailing of the ship, or more properly speaking, after the bill of lading is given, as it were, to replace the charter-party (*p*). And even where the charterer is

(*g*) *Jessen* v. *Solly*, 4 Taunt. 54; *Stindt* v. *Roberts*, 17 L. J. Q. B. 166; 12 Jur. 518; *Wegener* v. *Smith*, 15 C. B. 285; 24 L. J. C. P. 25.

(*h*) *Brouncker* v. *Scott*, 4 Taunt. 1; *Smith* v. *Sieveking*, 5 Ell. & Bl. 589; 24 L. J. Q. B. 257; *Chappel* v. *Comfort*, 10 C. B. N. S. 802; 31 L. J. C. P. 58.

(*i*) *Young* v. *Moeller*, 5 Ell. & Bl. 762; S. C. nom. *Möller* v. *Young*, 25 L. J. Q. B. 94.

(*k*) *Cawthron* v. *Trickett*, 15 C. B. N. S. 754; 33 L. J. C. P. 182; and see *Shadforth* v. *Cory*, 32 L. J. Q. B. 379.

(*l*) *Bannister* v. *Breslauer*, *infra*; *Kish* v. *Cory*, L. R. 10 Q. B. 553; *French* v. *Gerber*, 1 C. P. D. 737; 2 C. P. D. 247, C. A.

(*m*) *Lister* v. *Van Haansbergen*, 1 Q. B. D. 269.

(*n*) *Dahl* v. *Nelson*, 12 Ch. D. 568, C. A.; 6 Ap. Cas. 38. See *Capper* v. *Wallace*, 5 Q. B. D. 163.

(*o*) *Bannister* v. *Breslauer*, L. R. 2 C. P. 497; *Kish* v. *Cory*, L. R. 10 Q. B. 553; *Sanguinetti* v. *Pacific Steam Nav. Co.*, 2 Q. B. D. 238.

(*p*) Brett, J., *Gray* v. *Carr*, L. R. 6 Q. B. 522, 537; *Cristoffersen* v. *Hansen*, L. R. 7 Q. B. 569; *Lockhart* v. *Falk*, L. R. 10 Ex. 132.

discharged, it does not necessarily follow that the responsibility is transferred to the holder of the bill of lading (*q*).

Primage and average.—The freighter whose merchandise has been conveyed to the port of destination is also liable for the payment of certain customary charges called primage and average. The first is a small customary payment to the master for his trouble, and the second consists of several petty charges, such as towage, beaconage, pilotage, &c. (*r*).

General average and contribution.—By the ancient laws of the Rhodians, it was provided that, if several persons had laden goods on board a ship to be carried for hire, and the goods of one of them were thrown overboard in a storm to lighten the vessel and save her from perishing, the loss incurred for the sake of all should be made good by the contribution of all (*s*). This equitable rule of law was adopted by the Romans, and has been introduced into the maritime code of continental Europe. It is said to have been engrafted upon our own common law by the Normans, and has certainly existed as a custom amongst merchants in this country from a very early period. The obligation to contribute, which is deemed by the common law to be tacitly entered into by the shipowners and owners of the cargo, is called general or gross average; and the parties subject thereto are bound to contribute rateably according to the value of their several proportions of the property saved. The law of contribution is thus explained by Domat in his Treatise on the Civil Law:—"When, in order to lighten a ship in peril of shipwreck, part of the cargo is cast into the sea, and the ship by that means is saved, this loss is common to all those who have anything to lose in that peril. Thus the master of the ship, all those whose merchandise or effects have been saved, and those whose goods have been thrown overboard, will each bear their share of the loss, in proportion to the share they had in the whole. If, for example, the ship and the whole

(*q*) An intention to charge the holder of the bill of lading with demurrage at the port of loading, was held not to be expressed in *Smith* v. *Sieviking*, 4 E. & B. 945; 24 L. J. Q. B. 257; by the words "paying for the said goods as per charter-party." The words "paying freight as per charter-party," were held in *Chappel* v. *Comfort*, 10 C. B. N. S. 802; 31 L. J. C. P. 58, not to make the holder of the bill of lading liable for demurrage at the port of discharge; and in *Fry* v. *Chartered Bk. of India*, L. R. 1 C. P. 689, not to make the holder of the bill of lading of a part of the cargo liable for the entire freight. In *Wegner* v. *Smith*, 15 C. B. 285; 24 L. J. C. P. 25, words making the goods "deliverable to order against payment of the agreed freight *and other conditions* as per charter-party," were held to make the consignee liable for demurrage at the port of delivery, *Kern* v. *Deslandes*, 10 C. B. N. S. 205; 30 L. J. C. P. 297; the words "paying freight for the said goods as usual," were held to introduce a claim of lien from the charter-party into the bill of lading; but this case has been doubted; *per* Brett, J., *Gray* v. *Carr*, L. R. 6 Q. B. 540.

(*r*) Abbott, 404; Pothier (Avaries), No. 147.

(*s*) Dig. lib. 14, tit. 2, lex 1, *De lege Rhodiâ*; Pothier, Traité des Avaries, Partie 2, ed. Dupin, 371; Code de Commerce, liv. 2, tit. 11, Des Avaries.

cargo were worth 100,000 crowns, and that which was cast overboard was worth 20,000 crowns, the loss being a fifth, each will contribute a fifth part of the value of what he has saved, which will make in all 16,000 crowns; and by this contribution, those who lost the 20,000 crowns, in recovering 16,000, will remain losers only of a fifth part, like the rest" (*t*).

Everything saved pays contribution according to its value; the shipowner contributes in proportion to the value of the ship and furniture, except the provisions of the passengers and crew (*u*), and the passengers and owners of goods shipped on board in proportion to the value of the property they save, excepting the clothes on their backs, but not excepting their wearing apparel and jewels deposited on board (*x*). The freight and earnings of the ship, after deducting the wages of the master and crew and other expenses of the voyage, likewise form the subject of contribution and general average; and, if a ship be chartered out and home for one entire and indivisible sum for the use of the ship out and home, the entire freight for the outward and homeward voyage must, when ultimately earned, contribute to the loss, whether the loss has occurred upon the outward or the homeward voyage (*y*). Goods stowed upon the deck of the vessel, and thrown overboard during a storm, are excluded from the benefit of general average and contribution. Where a deck cargo was loaded on deck with the consent of the cargo-owner on a general ship, and there was no alleged custom bearing upon the case (*z*), the other cargo owners were held not liable as for general average in respect of jettison of the deck cargo (*a*). If goods are so loaded without the consent of the cargo-owner, the ship-owner is himself liable (*b*), and if it is agreed between the cargo-owner and the ship-owner that a deck cargo shall be carried, and the ship-owner and cargo-owner get the whole of the benefit from the jettison, it seems the ship-owner is liable (*c*).

To establish a claim for general average, it must be shown that the goods were thrown overboard in a moment of distress and danger, with a view of preserving the ship and cargo; if they have been washed out of the ship by the violence of the waves, or have been damaged or destroyed by lightning or tempest, or have been unnecessarily cast overboard by the master, or crew, or passengers, the loss will not support a claim for general average (*d*). If the

(*t*) Domat, les Lois Civiles, liv. 2, tit. 9, ss. 2, 6.

(*u*) *Brown* v. *Stapyleton*, 4 Bing. 119.

(*x*) Pothier, Avaries, art. 3: by the civil law, wearing apparel was made to contribute towards the general average; Dig. lib. 14, tit. 2, lex 2, s. 2.

(*y*) *Williams* v. *Lond. A. Co.*, 1 M. & S. 325.

(*z*) See *Miller* v. *Titherington*, 30 L. J. Ex. 217; 31 L. J. Ex. 363.

(*a*) *Wright* v. *Marwood*, 7 Q. B. D. 62.

(*b*) *Ib.*; this case practically overrules *Milward* v. *Hibbert*, 3 Q. B. 120.

(*c*) *Ib.*; *Johnson* v. *Chapman*, 19 C. B. N. S. 563.

(*d*) *Mouse's case*, 12 Co. 63; *Dobson*

masts and cables of the vessel have been cut away for the purpose of preventing shipwreck, the owners of the cargo must contribute towards the loss of the shipowner; but, if they are blown away, or injured in consequence of the necessity of carrying a great and unusual press of canvas to escape a threatening danger, or if the ship was not seaworthy at the commencement of the voyage, and the loss was occasioned by reason of such unseaworthiness, the loss is not the subject of contribution and general average (*e*). If a mast is cut away with a view to saving the whole adventure, but at the time when it is cut away it is certain to be lost in any event, then there is no "sacrifice" of the mast, and therefore no claim for general average (*f*). If a ship accidentally runs foul of another ship in a fog or storm, and the master is compelled to cut away his rigging in order to preserve the ship and cargo, and is obliged to put into port to repair and renew that which has been sacrificed, the expense of re-landing and warehousing the cargo, of pilotage, and of the repairs, so far as they are absolutely necessary to enable the cargo to be forwarded, form the subject of general average (*g*). In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one, exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice, as if, instead of money being expended for the purpose, money worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal or pays the worth of it to hire those extra services which get her off (*h*). If part of the cargo has been taken out and put into lighters, to enable a stranded vessel to be got afloat and sent into port for repairs, the whole expense of the operation, which is for the common benefit of ship, goods, and freight, forms the subject of general average (*i*); but not, as a general rule, expenses incurred, after the cargo has been safely discharged and warehoused, for the purpose of saving the ship alone (*k*). So long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average; but the expenditure in raising a submerged

v. *Wilson*, 3 Campb. 486; Pothier, Part 2, s. 2, art. 1.

(*e*) *Birkley* v. *Presgrave*, 1 East, 220; *Covington* v. *Roberts*, 5 B. & P. 379; *Power* v. *Whitmore*, 4 M. & S. 149; *Schloss* v. *Heriott*, 14 C. B. N. S. 59: 32 L. J. C. P. 211; Dig. lib. 14, tit. 2, lex 3, lex 5; Domat. liv. 2, tit. 19, s. 2, 11.

(*f*) *Shepherd* v. *Kottgen*, 2 C. P. D. 585, C. A.

(*g*) *Plummer* v. *Wildman*, 3 M. & S. 482, qualified by *Hallett* v. *Wigram*, 9 C. B. 601; 19 L. J. C. P. 288; *Hall* v. *Janson*, 4 Ell. & Bl. 508; *Harrison* v. *Bank of Australasia*, L. R. 7 Ex. 39; 41 L. J. Ex. 36; *Attwood* v. *Seller*, 5 Q. B. D. 286, C. A.

(*h*) Per Blackburn, J., *Kemp* v. *Halliday*, 6 B. & S. 723; 34 L. J. Q. B. 233.

(*i*) *Moran* v. *Jones*, 7 Ell. & Bl. 533; 26 L. J. Q. B. 187.

(*k*) *Job* v. *Langton*, 6 Ell. & Bl. 792; 26 L. J. Q. B. 97; *Walthew* v. *Mavrojani*, L. R. 5 Ex. 116; 39 L. J. Ex. 81.

vessel with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship (which *primâ facie* is the object of such an expenditure), chargeable against all the subjects in jeopardy saved by this expenditure (*l*). So also the expense of hiring extra hands to pump (*m*), and the burning of spars and cargo as fuel for the engine to work the pump (*n*), and throwing water on the cargo in case of fire (*nn*), has been held to be general average.

The American courts have enlarged the limit of general average, and have included within description of extraordinary expenses incurred for the common benefit, the expenses of repairs rendered necessary by extraordinary perils, and made at an intermediate port for the purpose of prosecuting the voyage (*o*).

If it is necessary to lighten the ship to enable her to get into a port of safety, and a portion of the cargo is taken out for the purpose and put into lighters, and the lighters perish ere they reach the shore, the loss will be common, and the owners of the residue of the cargo must contribute thereto, as it was for the general benefit that the discharge was made. But, if the ship is cast away and the lighter gets safe to port, there is then, it is said, no contribution, but each must bear his own loss. If a ship that has been saved from one danger of shipwreck by throwing some of the goods overboard is afterwards sunk in another place, and a portion of the cargo is recovered from the wreck, the owners of the cargo so recovered must contribute to make up the loss of those whose goods were thrown overboard for the purpose of avoiding the first peril, as the goods recovered might then have perished but for the sacrifice of the things thrown overboard to escape it. But, if he whose goods were thrown overboard at first happens afterwards to recover them, he shall not contribute towards the subsequent loss, as that loss has in nowise contributed to the safety of the goods so recovered. If by reason of a jettison of goods some portions of the residue of the cargo have been exposed and injured, this injury must, by the civil law, be made good by contribution. The owner of the damaged goods himself contributes towards the total loss according to the actual value of such goods after the injury, and is then entitled to contribution in respect of his own partial loss (*p*).

Salvage paid to recaptors, money or goods given as a composition to pirates to save the rest, and expenses incurred in reclaiming the ship, or defending a suit in a foreign court of

(*l*) *Per* Blackburn, J., *Kemp* v. *Halliday*, 6 B. & S. 723; 34 L. J. Q. B. 233.

(*m*) *Wilson* v. *Bank of Victoria*, L. R. 2 Q. B. 203.

(*n*) *Robinson* v. *Price*, 2 Q. B. D., 295.

(*nn*) *Whitecross Wire Co.* v. *Savill*, 8 Q. B. D. 653.

(*o*) Bovill, C. J., *Walthew* v. *Mavrojani*, *supra*.

(*p*) Dig. lib. 14, tit. 2, lex 4, ss. 1, 2,

Admiralty, and obtaining her discharge from an unjust capture or detention, are all the proper subjects of general contribution (*q*). It has been held that the expenditure of ammunition in resisting capture by a privateer, the damage done to the ship in the combat, and the expense of curing the wounded, are *not* the subject of contribution and general average. The correctness of this decision, however, may be doubted, opposed as it is to the opinions of some of the most eminent writers on maritime law, and to the acknowledged principle of contribution (*r*). " A practice formerly prevailed in this country to value the goods at their invoice price or prime cost, if the loss happened before half the voyage was performed; but, if it happened afterwards, then to value the goods at the clear price which they would have fetched at the place of destination. The last valuation is now adopted in all cases where the average is adjusted after the ship's arrival at the place of destination. But, if the ship is compelled to return to its port of lading, and the average is immediately adjusted, the goods only contribute according to the invoice price" (*s*), or even less, if in all probability they would have arrived in a damaged state; the general rule being that the value of goods jettisoned is to be taken to be the sum which it may fairly be assumed they would have been worth to the owner at the port of adjustment (*t*). As soon as the average has been calculated and the exact amount of contribution ascertained, an action may be brought for its recovery (*u*).

Where there has been a general average loss, the shipowner must take such steps as are necessary upon his part to procure an adjustment of the general average and secure its payment (*x*).

Transfer of bills of lading.—The contract evidenced by a bill of lading is transferred by the indorsement and delivery of the instrument to the indorsee, so as to enable the latter to maintain an action, or be sued, upon it (*y*). If the consignor under a bill of lading, making the goods deliverable to order or assigns, indorses the bill in blank, and deposits it as a security for an advance of money, and on re-payment of the advance the bill is re-indorsed and re-delivered to him, he is remitted to all his

7; Domat. liv. 2, tit. 9, s. 14 (AVARIES), No. 145; Pothier, des Avaries, art. 4.

(*q*) Marshall on Insurance, 4th ed., by Mr. Justice Shee, p. 425, the leading principle is thus stated: *Omnium contributione sarciatur quod pro omnibus datum est.*

(*r*) *Taylor* v. *Curtis*, 6 Taunt. 608; *ib.* 638—643; Phillips on Insurance, 337; Benecke, 280; Pothier (Avaries), s. 2, No. 144.

(*s*) Abbott, CONTRIBUTION.

(*t*) *Fletcher* v. *Alexander*, L. R. 3 C. P. 375; 37 L. J. C. P. 193.

(*u*) *Birkley* v. *Presgrave*, 1 East, 220; see the form of declaration, *Schloss* v. *Heriot*, 14 C. B. N. S. 59; 32 L. J. C. P. 214.

(*x*) *Crooks* v. *Allan*, 5 Q. B. D. 38.

(*y*) 18 & 19 Vict. c. 111; see *Dracachi* v. *Anglo-Egyptian Navigation Co.*, L. R. 3 C. P. 190; *Smurthwaite* v. *Wilkins* 13 C. B. N. S. 842; 31 L. J. C. P. 214; *The Figlia Maggiore*, L. R. 2 A. & E. 106; 37 L. J. Adm. 52; *The Freedom* L. R. 3 P. C. 394; 24 Vict. c. 10, s. 6

rights under the original contract as against the shipowners, and may sue them for a breach, whether occurring before or after the re-indorsement (z).

Damages for breach of charter-parties.—The measure of damages for the breach of the ordinary contract or covenant in a charter-party to procure and ship a cargo and pay freight (*ante*, p. 482) is to be ascertained by calculating the freight to be earned, and deducting the expense which the shipowner would have been put to, but did not incur, in earning it, and also what the ship earned (if anything) during the period which would have been occupied in performing the voyage if the charter-party had been fulfilled (a). If, subsequently to the breach of contract, the shipmaster has been offered a cargo and has refused it, or has neglected an opportunity of receiving cargo and earning freight, the measure of damages will be the amount of freight agreed to be paid, minus what the shipmaster might have earned if he had thought fit (b). When goods shipped on board have been sold at an intermediate port to defray expenses necessarily incurred in repairing the vessel, the shipper is not entitled to claim the price they might have realised at the port of delivery unless the ship and cargo arrive there in safety (c).

Restrictions on the carriage of dangerous goods.—By the 36 & 37 Vict. c. 85, s. 25, the master or owner of any vessel may refuse to take on board any package or parcel which he suspects to contain goods of a dangerous nature, and may require it to be opened to ascertain the fact. By s. 26, where any dangerous goods (d) or any goods which, in the judgment of the master or owner of the vessel are of a dangerous nature, have been sent or brought aboard any vessel without being marked or without notice being given as required by the Act (e), the master or owner of the vessel may cause such goods to be thrown overboard, together with any package or receptacle in which they are contained; and neither the master nor the owner of the vessel will be subject to any liability in respect of such throwing overboard.

Carriage of passengers and merchandise by land by parties not being common carriers—Injuries to passengers and goods.—All persons who undertake the work of carrying passengers by

(z) *Short* v. *Simpson*, L. R. 1 C. P. 248; 35 L. J. C. P. 147.

(a) *Smith* v. *M'Guire*, 3 H. & N. 567; 27 L. J. Ex. 465; *Wilson* v. *Hicks*, 26 *ib.* 242.

(b) *Harries* v. *Edmonds*, 1 C. & K. 686.

(c) *Atkinson* v. *Stephens*, 21 L. J. Ex. 333.

(d) That is, aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer matches, nitro-glycerine, petroleum, or any other goods of a dangerous nature, sect. 23. See also 38 Vict. c. 17, *post*, p. 527.

(e) By sect. 23, the nature of the goods must be marked on the outside of the package, and written notice of their nature and of the name and address of the sender or carrier must be given at or before the time of sending the same to be shipped, or taking the same on board the vessel.

land for hire impliedly warrant their vehicles, horses, harness, and equipments to be roadworthy, in good travelling order, and reasonably secure and sufficient in strength for the accomplishment of the journey, so far as that condition of things can be secured by the exercise of skill and foresight; but the carrier does not warrant that they shall be perfect for their purpose; and, therefore, he is not responsible for a defect in the vehicle, the existence of which no skill, care, or foresight could have detected (*f*), but he ought reasonably to examine the vehicle (*g*). As the work of driving is a work of skill, the carrier or coach-proprietor impliedly undertakes, if he drives himself, that he is possessed of, and will exercise, competent skill and knowledge of driving. If, on the other hand, he accomplishes the work through the medium of inferior agents and servants he impliedly undertakes to provide fit and proper persons to execute the office. If the driver overloads the carriage, or drives with immoderate speed, or with defective reins, or with reins so loose that he cannot readily command his horses, or if he passes unnecessarily along unsafe parts of the road, or through narrow gateways or dangerous passages, or takes the wrong side of the road, and a collision occurs, the proprietor of the carriage will be answerable for injuries sustained by the passengers (*h*). And, if, from the negligence or recklessness of the driver, or defects in the carriage, harness, or equipments, the passenger is placed in so perilous a situation as to render it advisable for him to leap to the ground to avoid a greater peril reasonably to be apprehended, and he sustains an injury in so doing, the coach proprietor is responsible (*i*). In determining the question of negligence in cases of collision, the law or custom of the road as to passing vehicles is to be taken into consideration; but it does not follow that a person who neglects that custom and is on the wrong side of the road when a collision takes place, is necessarily guilty of negligence. "Circumstances may frequently arise, where a deviation from what is called the law of the road would not only be justifiable, but absolutely necessary" (*k*).

Carriers of passengers by railway contract that all persons connected with the carrying and with the means and appliances of the carrying, such as the carriages, the road, or signalling, shall use

(*f*) *Burns* v. *Cork & Bandon Ry. Co.*, 13 Ir. C. L. R. 546; *Christie* v. *Griggs*, 2 Campb. 81; *Sharp* v. *Grey*, 9 Bing. 457; 2 M. & Sc. 620; *Readhead* v. *The Midland Ry. Co.*, L. R. 4 Q. B. 379; 38 L. J. Q. B. 169; *Francis* v. *Cockerell*, L. R. 5 Q. B. 184; *ib.*, 501; 39 L. J. Q. B. 291: an overloaded coach is not roadworthy, *Israel* v. *Clarke*, 4 Esp. 259; *Aston* v. *Heaven*, 2 Esp. 535.

(*g*) *Richardson* v. *G. E. Ry. Co.*, L. R. 10 C. P. 486, reversed on the findings on appeal, 1 C. P. D. 342.

(*h*) *Aston* v. *Heaven*, 2 Esp. 535; *Bremner* v. *Williams*, 1 C. & P. 414.

(*i*) *Jones* v. *Boyce*, 1 Stark. 493.

(*k*) *Wayde* v. *Lady Carr*, 2 D. & R. 256.

care and diligence; but they do not contract that other railway companies who may be entitled to use the railway shall not be guilty of negligence in the management of their trains (*l*).

Every carrier of passengers for hire, whether he be or be not a common carrier, is bound to exercise the greatest care and forethought for securing the safety of his passengers, and is answerable for the smallest negligence on his own part, or on the part of his servants and agents (*m*), but not for unforeseen accidents and misfortunes, which care and vigilance could not have provided against or prevented. He "does not warrant the absolute safety of his passengers. His undertaking as to them goes no further than this, that as far as human care and foresight can go, he will provide for their safety." "When everything has been done that human prudence can suggest, an accident may happen. The lights may, in a dark night, be obscured by fog; the horses frightened; or the coachman may be deceived by a sudden alteration in the position of objects near the road by which he had been used to be directed in former journeys; and if, having exerted proper skill and care, he from accident gets off the road, the proprietors are not answerable for what happens from his doing so." But the breaking down or overturning of a coach is *primâ facie* proof of negligence on the part of the driver, and he must rebut this presumption, if it be unfounded, by showing that "the damage arose from what the law considers a mere accident" (*n*). When the carriage is by railway, the railway company is bound to keep the railway itself in good travelling order, and fit for use, and to provide roadworthy engines and carriages, skilful drivers and engineers, and all things necessary for the safe conveyance of such passengers; and by the 31 & 32 Vict. c. 119, s. 22, to provide in certain cases for means of communication between the passengers and the guard. But the company is not bound, at its peril, to provide a roadworthy carriage, and will not be responsible to a passenger, if the defect in the carriage is such that it could neither be guarded against in the process of construction, nor discovered by subsequent examination (*o*).

If the driver of a railway-engine drives at a dangerous speed, or from negligence or unskilfulness causes the train to be thrown off the rails, or to come into collision with another train, the railway company is responsible for all damages and injuries that may have

(*l*) *Wright* v. *Midland Ry. Co.*, L. R. Ex. 137; 42 L. J. Ex. 89. As to this see *post*, p. 563.

(*m*) *Jackson* v. *Tollett*, 2 Stark. 38; *Dudley* v. *Smith*, 1 Campb. 169.

(*n*) *Crofts* v. *Waterhouse*, 11 Moore, 137; 3 Bing. 321; *Sharp* v. *Grey*, 2 M. & Sc. 620; 9 Bing. 460; *Harris* v. *Costar*, 1 C. & P. 637.

(*o*) *Readhead* v. *Midland Ry. Co.*, L. R. 2 Q. B. 412; *S. C.* (Exch. Ch.), *ibid.* 4 Q. B. 379.

been sustained by the passengers (*p*). But if a railway-train runs off the line in consequence of the wilful and malicious act of a stranger, who has placed a stone on the railway, then, as there is no negligence on the part of the railway company, they are not responsible for the consequences (*q*).

A railway company will be responsible for an injury sustained by a child between the ages of three and twelve, travelling with its mother, although no separate fare was paid for the child, at all events in the absence of fraud on the part of the mother (*r*), and the company cannot shield itself under the contract with the mother (*s*). The contract seems to be made by the invitation to take the seat in the train and the acceptance of it, and it is immaterial whether the traveller himself took a ticket or paid the fare (*t*). But where a servant has taken a ticket for himself, the master cannot sue, because the tort arises out of a contract to which the master is not a party, and there is no duty towards the master (*u*). It seems, however, that where the servant has taken a ticket from one company and has been injured by the negligence of another, the master may sue that company with whom neither has contracted (*x*). These cases do not appear to be satisfactory; but it seems that, though generally speaking an action against a railway company for a tort in form is substantially for a breach of contract, where there is a contract express or implied between the parties, yet there is, beyond the contract, a duty which the law imposes upon all, namely, to do no act to injure another (*z*).

When the very occurrence of a railway accident is primâ facie proof of negligence.—When both the railway itself, and the carriages in which the passengers are conveyed, are under the exclusive control of the company carrying the passengers, the very fact of a train's running off the line has been held to be *primâ facie* proof of negligence on the part of such company, or its officers, and throws upon them the burthen of explaining how it happened, and of showing that it occurred without any fault or neglect of duty on their part (*a*). And it is not sufficient to show that other companies had running powers over their line, without

(*p*) *Collett* v. *Lond. & N. W. Ry. Co.*, 16 Q. B. 984; *Skinner* v. *Lond., Br. &c. Ry. Co.*, 5 Exch. 787.

(*q*) *Latch* v. *Rumner Ry. Co.*, 27 Law J. Exch. 155.

(*r*) *Austin* v. *Gt. West. Ry. Co.*, L. R. 2 Q. B. 442.

(*s*) S. C.

(*t*) *Marshall* v. *Y. & N. Ry. Co.*, 11 C. B. 655; *Austin* v. *G. W. Ry. Co.*, *supra*.

(*u*) *Alton* v. *Midland Ry. Co.*, 19 C. B. N. S. 213; 34 L. J. C. P. 292.

(*x*) *Berringer* v. *Gt. East. Ry. Co.*, 48 L. J. C. P. 400, *per* Lopes, J.

(*z*) *Fleming* v. *M. S. & L. Ry. Co.*, 4 Q. B. D. 81; *Foulkes* v. *Met. Dist. Ry. Co.*, 4 C. P. D. 267; 5 C. P. D. 157.

(*a*) *Carpue* v. *Lond. & Br. Ry. Co.*, 5 Q. B. 751; *Latch* v. *Rumner Ry. Co.*, *supra*; *Dawson* v. *Manch. &c. Ry. Co.*, 5 Law T. R. N. S. 682; see *Scott* v. *Lond. Dock Co.*, 34 Law J. Exch. 17; *ib.* 220; as to interrogatories in cases of collision, see *Beckervaise* v. *Gt. West. Ry.*, L. R. 6 C. P. 36.

showing affirmatively that it was through the negligence of such other companies that the accident occurred (*b*). But if the accident is *primâ facie* caused by the negligence of some third person, for whom the defendants are not responsible, *e.g.*, a contractor engaged in placing iron girders over the defendant's line for some third person, it must be shown that the accident resulted from, or might not have occurred, but for, the defendant's omitting to take some precaution usually adopted in such cases (*c*). If it appears that the train went off the rails when travelling at a moderate speed, and that the wheels of the carriages and engine were properly constructed, and the railway itself was properly made and in good order, and that the departure of the engine and carriages from the rails might have been occasioned by the malicious trespass of a stranger (*ante*, p. 522), there will be nothing to establish even a *primâ facie* case of negligence against the company (*d*). But if the railway bridges or viaducts have not been properly constructed, or have not been carefully maintained and repaired, so as to enable them to resist the violence of storms and floods which may be expected occasionally to occur, and injuries are thereby caused to passengers (*e*), the railway company will be responsible in damages, although they may have employed competent engineers and workmen, and have used the best materials in the work (*f*).

The 8 Vict. c. 20 s. 68, imposes no duty on a railway company towards their passengers to keep up fences so as to prevent cattle straying from adjoining lands on to the line. Neither are the company bound, at common law, to maintain fences sufficient to keep cattle off the line under all circumstances; but they are bound to use every reasonable care to prevent them straying on the line (*g*).

Every person who receives goods to be carried from one place to another is bound to provide tarpaulins and proper "covering to protect the goods from injury by rain" (*h*).

Loss of goods or money by the way.—A person who receives things to be carried by him for hire to a certain destination cannot set up a mere loss of them by the way as an answer to an action for the non-delivery of them according to his contract (*ante*,

(*b*) *Ayles* v. *South-East. Ry.*, L. R. 3 Exch. 146.

(*c*) *Daniel* v. *Metropolitan Ry.*, L. R. 3 C. P. 216; 3 *Ibid.* 591; 5 Engl. & Ir. App. 45.

(*d*) *Bird* v. *Gt. Northern Ry. Co.*, 28 Law J. Exch. 3.

(*e*) *Gt. West. &c. of Canada* v. *Fawcett*, 1 Moore's P. C. N. S. 101.

(*f*) *Grote* v. *Chester & Holyhead Ry. Co.*, 2 Exch. 255.

(*g*) *Buxton* v. *North Eastern Ry. Co.*, L. R. 3 Q. B. 549; they are bound to fence for the benefit of the occupier, so as to prevent his cattle from straying, even although the owner of the land has agreed to take money in lieu of fencing, *Corry* v. *G. W. Ry.*, 7 Q. B. D. 322.

(*h*) *Webb* v. *Page*, 6 Sc. N. R. 957; 6 M. & Gr. 204; *Walker* v. *Jackson*, 10 M. & W. 168.

p. 494). Where the plaintiff delivered to the defendant 3*l.*, to be carried to Southwark, for reasonable hire and reward, it was held that the law would imply a promise from the defendant "safely to convey" the money, although he was not a common carrier, and although no sum certain had been agreed to be paid him as the price of the carriage (*i*). And, where a traveller hired a cab for the conveyance of himself and his luggage to a railway station, and the luggage was placed on the outside of the cab, it was held that the law would imply from the acceptance of the luggage by the cabman to be carried, together with the passenger, for hire, a promise from him "safely and securely" to carry it, and that he was responsible for the loss of a portion of it by the way (*k*). This promise to carry safely, which the law implies from all persons who undertake the carriage of goods for hire, is not understood to mean that the goods shall be carried and delivered safe at all events, but that they shall be kept safe from all such hazards and contingencies as might have been foreseen and guarded against by the exercise of vigilance or skill. The contract is "a contract to carry safely and securely as far as regards the neglect of the carrier himself and his servants, but not to insure the safety of the goods;" and the carrier therefore would not be liable for losses by robbers, or any taking by force; but he is *primâ facie* responsible for a secret theft of them, and can only discharge himself from liability by proving his own care and watchfulness and blamelessness in the matter (*ante*, p. 495).

Where the defendant received eleven boxes of gold dust, under a special contract to carry them and deliver them at the Bank of England, "robbers and dangers of the road excepted," and one of the boxes was secretly stolen, it was held that the defendant was responsible for the loss; that a secret theft or pilfering was not within the exception as to robbers, nor was it a danger of the road within the meaning of the contract (*l*). If the owner accompanies the goods to take care of them, and loses them himself, the carrier is not responsible for the loss (*m*).

Who is to be deemed a common carrier.—Every person who plies with a carriage by land, or a boat or vessel by water, between different places, and professes openly to carry passengers and goods for hire, is a COMMON CARRIER. Such are railway companies, who profess to carry passengers, parcels, and merchandise, stage-coach and stage-waggon proprietors, lightermen, hoymen, barge owners,

(*i*) *Rogers* v. *Head*, Cro. Jac. 262; *Matthews* v. *Hopping*, 1 Keb. 852.

(*k*) *Ross* v. *Hill*, 2 C. B. 877; 15 L. J. C. P. 182.

(*l*) *De Rothschild* v. *R. M. St. P. Co.*, 7 Exch. 734; 21 L. J. Ex. 273.

(*m*) *Brind* v. *Dale*, 8 C. & P. 209, 211; 2 M. & Rob. 80; see also cases as to passenger's luggage, *post*, p. 544.

canal boatmen, and the owners and masters of ships and steamboats employed as general ships trading regularly from port to port for the transportation of all persons offering themselves or their goods to be conveyed for hire to the port of destination (*n*). The owner of a cart or carriage who does not ply regularly for hire to a particular destination, but merely lets out a private carriage, with horses and driver, by the hour, day, or job, to proceed to any destination ordered by the hirer, is not a common carrier. A London cabdriver or hackney coachman, for example, is not a common carrier (*o*), nor is a furniture remover (*oo*); but a barge-owner is, although he does not ply between any fixed *termini*, and only lets his barges for a single voyage to one person at a time, if he lets out his vessels for the conveyance of the goods of any person who applies to him (*p*). Railway companies are, apart from statute law or special contract, common carriers, and the Railway Clauses Act, 1845 (*q*), provides that they shall not be liable to any greater extent than common carriers; but their rights and liabilities are further regulated and limited, as we shall see, both by statute and by special contracts. It is the duty of all who hold themselves out to the world as common carriers to carry, for every person who tenders them the proper charge, all goods which they have convenience for carrying, and in respect of which they hold themselves out as carriers, without subjecting the person tendering the goods to any unreasonable or unusual conditions (*r*). By many of the railway Acts it is expressly enacted that railway companies shall act as common carriers, that they shall convey passengers and goods by locomotive engines, and that they shall provide for all persons conveying and sending goods by their railway every reasonable convenience and facility for the loading and unloading of goods (*s*).

Duties of the common carrier.—Every common carrier is bound to accept and carry all such things as he publicly professes to carry for all persons who are ready and willing to pay him his customary hire, provided he has room in his cart or carriage for their conveyance, and has declared his intention to set out on his accustomed journey (*t*). He is bound to carry them to and from the places to which he professes to carry, although one of those places may be without the realm (*u*); for whenever a man

(*n*) *Lovett* v. *Hobbs*, 2 Show. 127; *Robinson* v. *Dunmore*, 2 B. & P. 416; *Laveroni* v. *Drury*, 8 Exch. 166; *Crouch* v. *Lond. & North-West. Ry. Co.*, 23 L. J. C. P. 73.

(*o*) *Brind* v. *Dale*, 8 C. & P. 207; *Ross* v. *Hill* 2 C. B. 887: 15 Law J. C. P. 182.

(*oo*) *Scaife* v. *Farrant*, *post*, p. 540.

(*p*) *Liver Alkali Co.* v. *Johnson*, L. R. 9 Ex. 338; 43 L. J. Ex. 216.

(*q*) Sect. 89.

(*r*) *Garton* v. *Brist. & Ex. Ry. Co.*, 1 B. & S. 162; 30 L. J. Q. B. 294.

(*s*) *Pegler* v. *Monm. Ry. &c. Co.*, 6 H. & N. 644; 30 L. J. Ex. 249.

(*t*) Bac. Abr. CARRIERS, B.; *Pickford* v. *Grand Junction Ry. Co.*, 8 M. & W. 372.

(*u*) *Crouch* v. *Lond. and North-West. Ry. Co.*, 14 C. B. 29[illegible]; 23 Law J. C. P. 73.

undertakes the public office or profession of a common carrier of goods he undertakes a public trust for the benefit of the rest of his fellow-subjects, and is bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him (x). A carrier is not bound to carry goods by the shortest route, but only by the route by which he usually carries them, and which he professes to go (y). If he journeys by a particular roundabout road between one place and another, he is not bound to carry by a shorter route; but he is bound to use reasonable dispatch and to deliver within a reasonable time (z). If he limits his enterprise and business to the carriage of particular classes of merchandise or chattels, he can only be compelled to carry the things he publicly professes to carry, and is in the habit of carrying. If the carriage of certain commodities is attended with inconvenience or some peculiar risk, he may refuse to receive and carry such articles as a common carrier (a), but may, nevertheless, accept and carry them under a special contract throwing the risk of damage to them from ordinary accidents during the transit upon the owner or the consignor (b). In the absence of a contract to deliver at a particular time, the duty of a common carrier is to deliver at a reasonable time, looking at all the circumstances of the case; and, since his first duty is to carry safely, he is justified in incurring delay, if delay is necessary to secure the safe carriage (c). He is not responsible for the consequences of delay arising from causes beyond his control. Where, therefore, the defendants, a railway company, were prevented by an unavoidable obstruction on their line from carrying the plaintiffs' goods within the usual time, and the obstruction was caused by an accident resulting solely from the negligence of another company, who had, under an agreement with the defendants, sanctioned by Act of parliament, running powers over their line, it was held that the defendants were not liable to the plaintiff for damage to his goods caused by the delay (d).

As regards dogs and live animals, if the carrier does not, by his public profession and practice undertake to carry them, he

(x) Keilwey, 50, pl. 4.

(y) Per Willes, J., *Myers* v. *Lond. & South-West. Ry.*, L. R. 5 C. P. 3.

(z) *Hales* v. *Lond. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J. Q. B. 292; *In re Oxlade* v. *The North Eastern Ry. Co.*, 15 C. B. N. S. 680.

(a) *Johnson* v. *Mid. Ry. Co.*, 4 Exch. 371; *McManus* v. *Lanc. & York. Ry. Co.*, 4 H. & N. 327; 28 L. J. Ex. 353.

(b) *Peek* v. *North Staff. Ry. Co.*, 32 L. J. Q. B. 241; *Phillips* v. *Edwards*, 28 L. J. Ex. 52; 3 H. & N. 813; *Austin* v. *Manch. Ry. Co.*, 16 Q. B. 600; 10 C. B. 454; *Carr* v. *Lanc. & York. Ry. Co.*, 7 Exch. 707; *Martin* v. *Gt. Indian Pen Ry.* L. R. 3 Exch. 9.

(c) *Taylor* v. *Great Northern Ry. Co.*, L. R. 1 C. P. 385; 35 L. J. C. P. 210.

(d) *Taylor* v. *Great Northern Ry. Co.*, *supra*.

may decline to receive and carry them except upon certain special conditions, and under a special contract regulating and defining the nature and extent of his liability (e). But in the case of a railway or canal company the conditions or special contract must be just and reasonable, must not exempt the company from liability for their own neglect or default, and must be in writing signed by the consignor or his agent (f). Where carriers by sea give public notice that they receive goods for shipment on the condition and agreement only of the ship sailing under a bill of lading in the form ordinarily adopted, they are not bound to receive and carry otherwise than in accordance with their published terms (g).

The mere posting up at a particular railway station of a list of tolls taken by the company for the carriage of coals, amongst other things, will not constitute the company common carriers of coals from that particular station, if it appears that they have no accommodation there for receiving coals, and do not, in point of fact, carry them from that spot, although they carry them over other parts of their line (h).

By the 38 Vict. c. 17, the carriage of dangerous goods is regulated (i). If a carrier is employed to carry an article of such a dangerous nature as to require extraordinary care in its conveyance, the fact must be communicated to him, or the consignor will be responsible for any injury that may result to the carrier or his servants from the want of such communication (k).

The Privy Council may make orders on persons carrying animals for hire to cleanse and disinfect the vessels, vehicles, &c., used for such purpose (l). Every railway company is also bound, on the written request of the consignor or person in charge of any animals carried by them, to provide the animals with food and water at such stations as the Privy Council may direct, and will have a lien for the reasonable expense of supplying such food and water on the animals so supplied, and also on any other animals carried for the same consignor (m).

Every common carrier of passengers with luggage is bound to take the customary quantity of luggage with each passenger, con-

(e) *Harrison* v. *Lond. & Br. Ry. Co.*, 29 L. J. Q. B. 218; 31 L. J. Q. B. 113; 2 B. & S. 122.

(f) 17 & 18 Vict. c. 31, s. 7; *post*, p. 555.

(g) *Phillips* v. *Edwards*, *ante*, p. 526; *Wilton* v. *Royal Atlantic Mail St. Packet Co.*, 10 C. B. N. S. 453; 30 L. J. C. P. 369.

(h) *Oxlade* v. *North E. Ry. Co.*, 15 C. B. N. S. 680; *Johnson* v. *Mid. Ry. Co.*, 4 Exch. 372.

(i) Harbour authorities and railway and canal companies may make bye-laws as to the carriage, ss. 34, 35, and the Secretary of State as to other carriers, s. 37; as to specially dangerous explosives, see s. 43; and as to exemption of carrier where consignor or consignee is in fault, s. 88.

(k) *Farrant* v. *Barnes*, 11 C. B. N. S. 553; 31 L. J. C. P. 137.

(l) 41 & 42 Vict. c. 74, s. 32, xxi., s. 62; see *Cox* v. *Gt. East. Ry.*, *post*, p. 491.

(m) 41 & 42 Vict. c. 74, s. 33, xii., s. 66, 5.

sisting of such things as a traveller, according to the wants of the class to which he belongs, usually carries with him for his own personal convenience, either with reference to the immediate necessities, or to the ultimate purpose, of the journey, but he is not bound to carry merchandise or articles wholly unconnected with luggage, unless he professes to carry merchandise, or unless the traveller tenders or is ready to pay the customary hire for merchandise (*n*), or unless the carrier knows the luggage is merchandise (*nn*). Deeds and money carried by an attorney in his portmanteau for use in the causes in which he may be engaged are not "ordinary luggage" for which a railway company is responsible (*o*), nor is a child's rocking-horse (*p*), nor sheets and blankets intended for the use of the passenger's household when permanently settled (*q*), but a chronometer is, it seems, luggage for a master mariner (*r*).

Of the public profession of railway companies made through the medium of their time-tables.—A railway company by the publication of a time-table, represents that a train will run at or about the time specified, and the company will be responsible in damages to all who tender themselves for conveyance at the appointed time and find that no train at all has been provided (*s*); but railway companies do not by their time-tables guarantee the arrival of their trains at intermediate stations, or their departure from them, at the exact time fixed. All they undertake to do is to carry the passenger without any unreasonable and unnecessary delay (*t*). But the sticking up of a table of tolls at the different stations does not imply that the company carries all the things mentioned therein from each station (*u*). The mere taking of a ticket is not sufficient evidence of a contract to convey a passenger to a certain place within a given time; the time-bills must be produced to prove the contract (*x*).

Booking places in coaches.—If four ladies, wishing to travel together, take "the whole inside of a coach," the coach-proprietor and his servants have no right to separate them, and do not fulfil their contract by furnishing a double-bodied coach, and tendering three inside places in one division and one in the other (*y*). "If a person takes a place in a stage-coach, and pays at

(*n*) *Great Northern Ry. Co.* v. *Shepherd*, 8 Exch. 30; 21 Law J. Exch. 114; as to passengers' luggage generally, see *post*, p. 544.

(*nn*) *Cahill* v. *L. & N. W. Ry. Co.*, 10 C. B. N. S. 154; 31 L. J. C. P. 271.

(*o*) *Phelps* v. *Lond. & North West. Ry. Co.*, 34 Law J. C. P. 259.

(*p*) *Hudston* v. *Midland Ry.* 38 L. J. Q. B. 213; L R. 4 Q. B. 366.

(*q*) *Macrow* v. *Gt. Western Ry.*, L. R. 6 Q. B. 612.

(*r*) *Le Conteur* v. *Lond. & South West Ry. Co.*, L. R. 1 Q. B. 54.

(*s*) *Denton* v. *Gt. North. Ry. Co.*, 5 Ell. & Bl. 868; 25 L. J. Q. B. 129; two of the judges thought there was a contract, and all three that there was a tort.

(*t*) *Hurst* v. *Gt. West. Ry. Co.*, 19 C. B. N. S. 310; 34 L. J. C. P. 264.

(*u*) *Oxlade* v. *North East. Ry. Co.*, 15 C. B. N. S. 680; 33 Law J. C. P. 171.

(*x*) *Hurst* v. *Gt. West. Ry. Co.*, 34 Law J. C. P. 265; and see *Robinson* v. *Gt. West. Ry. Co.*, 35 Law J. C. P. 123.

(*y*) *Long* v. *Horne*, 1 C. & P. 611.

the time only a deposit, as half the fare, for example, and is not at the inn ready to take his place when the coach is setting off, the coach-proprietor is at liberty to fill up his place with another passenger; but, if at the time of taking his place he pays the whole of the fare, in such case the coach-proprietor cannot dispose of his place, but the passenger may take it at any stage of the journey he thinks fit (z).

Implied undertaking of railway companies to forward passengers or goods without unnecessary delay.—Every railway company also which has sold tickets to an intended passenger impliedly undertakes to provide means of conveyance and forward him to his place of destination with reasonable speed (a), and is responsible in damages if the passenger suffers serious personal inconvenience from a breach of this undertaking (b). But pecuniary loss sustained by the passenger by reason of his not being able to get to a place, which he could otherwise have arrived at in time to meet persons with whom he had appointments, is too remote (c). The principle is that, if one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable is to consider whether, according to the ordinary habits of society, a person delayed on his journey would have incurred the expenditure in question on his own account (d).

If railways are blocked up and impeded by snow, the company is bound to use all reasonable exertions to forward the passengers, though extra expense must be incurred by the company in so doing, which they have no means of recovering from their passengers; but the owners of goods and cattle have no right to complain that extraordinary efforts which are made to forward passengers are not used to forward cattle and goods. "If a snowstorm occurs which makes it impossible to forward cattle except by extraordinary means, involving additional expense, the company are not bound to use such means and to incur such expense" (e). So if there be delay in delivering goods by reason of an accident occurring on the defendants' line, such accident being caused wholly by the negligence of another railway company, which had running powers over the defendants' line, the defendants, in the absence of a special contract to deliver within a certain time, are not responsible (f).

(z) *Ker* v. *Mountain*, 1 Esp. 26.

(a) *Gt. North. Ry. Co.* v. *Hawcroft*, 21 L. J. Q. B. 179.

(b) *Hobbs* v. *London & South Western Ry. Co.*, L. R. 10 Q. B. 111; *Burton* v. *Pinkerton*, L. R. 2 Ex. 340.

(c) *Hamlin* v. *Great Northern Ry. Co.*, 1 H. & N. 408; 26 L. J. Ex. 20.

(d) *Le Blanche* v. *L. & N. W. Ry. Co.*, 1 C. P. D. 286, C. A.

(e) *Briddon* v. *Great Northern Ry. Co.*, 28 L. J. Ex. 51.

(f) *Taylor* v. *Great Northern Ry. Co.*, L. R. 1 C. P. 385.

Negligence of common carriers—implied undertaking.—Common carriers are bound by the mere fact of their having received passengers, independently of any contract, to take the utmost care for their safe conveyance (*g*); and, if an accident arises causing injury, a common carrier can discharge himself only by proving that the accident was inevitable (*h*), that is, that it did not occur from the want of due care, not only on the part of himself and his servants, but also on the part of any independent contractor who may have been employed by him to construct the means of conveyance (*i*). The carrier, however, is not bound, as we have seen, *ante*, p. 521, at his peril to provide a carriage absolutely roadworthy at the commencement of the journey; and, if the carriage turns out to be defective, he is not liable to a passenger for the consequences, if the defect was of such a nature that it could neither be guarded against in the process of construction nor discovered by subsequent examination (*k*). Where a passenger stood up and looked out of the window, and, by reason of the door being unfastened, fell out and was injured, it was held that there was evidence of negligence by the railway company for which they were liable (*l*). But a passenger may, by special agreement, contract to be carried at his own risk, so as to exempt the company from responsibility for even the gross and wilful negligence of their servants (*m*); and in such a case the company will be exempt from liability not only during the transit, but while the passenger is leaving the company's premises (*n*). Such a special agreement will protect not only the company with which it is made, but also any other company on whose line the passenger may be carried in the course of the journey (*o*).

A common carrier of goods is not, in the absence of a special contract, bound to carry within any given time, but only within a time which is reasonable, looking at all the circumstances of the case, and he is not responsible for the consequences of delay arising from causes beyond his control. Thus, when a railway company were prevented, by an unavoidable obstruction on their line, from carrying the plaintiff's goods within the usual (a

(*g*) *Austin* v. *Great Western Ry. Co.*, L. R. 2 Q. B. 442.

(*h*) *Burns* v. *Cork & Bandon Ry. Co.*, *infra*.

(*i*) *Grote* v. *The Chester and Holyhead Ry. Co.*, 2 Ex. 251; *Burns* v. *The Cork & Bandon Ry. Co.*, 13 Ir. C. L. R. 543; *Francis* v. *Cockrell*, L. R. 5 Q. B. 184, 501; 39 L. J. Q. B. 291; *John* v. *Bacon*, L. R. 5 C. P. 437; 39 L. J. C. P. 365.

(*k*) *Readhead* v *The Midland Ry. Co.*, L. R. 4 Q. B. 379; 38 L. J. Q. B. 169; *Richardson* v. *Gt. E. Ry.* 1 C. P. D. 342.

(*l*) *Gee* v. *Metropolitan Ry. Co.*, L. R. 8 Q. B. 161, commenting on *Adams* v. *L. & Y. Ry.*, L. R. 4 C. P. 739.

(*m*) *McCawley* v. *Furness Ry. Co.*, L. R. 8 Q. B. 57; 42 L. J. Q. B. 4.

(*n*) *Gallin* v. *London & North Western Ry. Co.* L. R. 10 Q. B. 212.

(*o*) *Hall* v. *North Eastern Ry. Co.*, L. R. 10 Q. B. 437; as to how far this applies to carriage of goods, see *post*, 556, Railway and Canal Act, reasonable conditions.

reasonable) time, and the obstruction was caused by an accident resulting solely from the negligence of another company, who had, under an agreement, sanctioned by Act of Parliament, running powers over their line, it was held that the first-named company were not liable to the plaintiff for damage to his goods caused by the delay (*p*).

An invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence (*q*). The opening of the carriage door is an invitation to alight (*r*); and so is the bringing up of a train to a final stand-still, for the purpose of the passengers alighting, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out, if he purposes to alight at the particular station (*s*). If the plaintiff, exercising his own discretion, chooses to get out of a train which has overshot the platform, the company are not responsible (*t*), especially when the station is well known to the plaintiff (*u*). Calling out the name of the station before the train has come to a stand-still, is not an invitation to alight; nor is merely over-shooting the platform negligence (*v*). But if the porter has called out the name of the station, and the engine-driver has overshot the platform, and the train has come to a stand-still, and no warning is given not to alight, the jury may very properly say that a passenger is not guilty of negligence in getting out (*x*). Similar considerations arise in cases where the door of a railway-carriage is slammed by a porter upon the hand of the plaintiff, and which may or may not be the negligence of the company or of the plaintiff, according to circumstances (*y*).

Loss of goods by common carriers.—"The law," observes Holt, C.J., "charges every person exercising the public employment of a common carrier, common hoyman, or master of a ship intrusted to

(*p*) *Taylor* v. *Great Northern Ry. Co.*, L. R. 1 C. P. 385; 35 L. J. C. P. 210.

(*q*) *Cockle* v. *L. & S. E. Ry. Co.*, L. R. 7 C. P. 321.

(*r*) *Prager* v. *Bristol & Exeter Ry. Co.*, 24 L. T. N. S. 105; *L. & N. W. Ry.* v. *Hellawell*, 26 L. T. N. S. 557; *Gill* v. *G. E. Ry.*, 26 L. T. N. S. 945.

(*s*) *Cockle* v. *L. & S. E. Ry. Co.*, *supra*; *Bridges* v. *L. & N. W. Ry.*, L. R. 7 H. L. 215; *Rose* v. *N. E. Ry.*, L. R. 2 Ex. D. 248; *Nichols* v. *Gt. Southern Co.*, 7 Ir. C. L. 40; 21 W. R. 387.

(*t*) *Siner* v. *G. W. Ry.*, L. R. 4 Ex. 117; 38 L. J. Ex. 67; but see *per* Brett, L. J., on this case in *Robson* v. *N. E. Ry.*, L. R. 2 Q. B. D. 86; 46 L. J. Q. B. 50; and see *Weller* v. *L. B. & S. C.*, *infra*, and *Rose* v. *N. E. Ry.*, *supra*.

(*u*) *Lewis* v. *L. C. & D. Ry.*, L. R. 9 Q. B. 66.

(*v*) *Lewis* v. *London, Chatham & Dover Ry. Co.*, L. R. 9 Q. B. 66; *Cockle* v. *South Eastern Ry. Co.*, L. R. 5 C. P. 468, 7 C. P. 321.

(*x*) *Weller* v. *London, Brighton & South Coast Ry. Co.*, L. R. 9 C. P. 126.

(*y*) *Fordham* v. *L. B. & S. C. Ry.*, L. R. 4 C. P. 619; 38 L. J. C. P. 324; *Richardson* v. *Met. Ry.*, 37 L. J. C. P. 176; *Maddox* v. *L. C. & D Ry.*, 38 L. T. N. S. 458; *Coleman* v. *S. E. Ry.*, 4 H. & C. 699; *Jackson* v. *Met. Ry.*, L. R. 10 C. P. 49; *Met. Ry. Co.* v. *Jackson*, 3 Ap. Cas. 193.

carry goods, against all events but acts of God and enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sort of persons, that they may be safe in their dealings. For else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c.; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point" (z).

By the term "act of God" is meant something in opposition to the act of man, such as storms, lightning, tempests, and inevitable accidents not resulting from human agency. If the danger or the accident, though unavoidable, has been occasioned by the act of man, the carrier cannot avail himself of it as an excuse for the non-delivery of the goods (a). Thus, where an action was brought against a common carrier for not safely carrying and delivering a quantity of hops, and it appeared that a fire broke out in a building adjoining a booth under which the carrier had placed the hops, and burnt with inextinguishable violence, and extended itself to the hops, and consumed them, without any neglect or default on the part of the carrier himself, it was held that, inasmuch as the fire had not been occasioned by lightning, but by the act of man, the occurrence of the disaster constituted no answer to the action (b). If the goods have been destroyed or swept away by rains and floods, the circumstances attendant upon the loss must be regarded, in order to determine whether it has been occasioned by the act of God or the act of man. If the common carrier has neglected to provide proper covering for the goods; if he has gone out of his way to meet the danger; if he has travelled by unusual roads, or crossed a plain subject to inundations when he might have kept the high ground and been safe, the loss occasioned thereby is a loss from the act or negligence of man, and the common carrier is consequently responsible therefor (c).

If a barge-owner who carries goods for hire on a canal accepts certain goods to be carried for hire, and rats gnaw a hole in the barge, and cause a leak, and the goods are injured, the barge-owner is responsible for the damage (d). He is not, of course, responsible for any deterioration in the value of the goods resulting from the negligence or want of care of the owner or the consignor, such as

(z) *Coggs* v. *Bernard*, 2 Ld. Raym. 909; 1 Smith's L. Ca. 6th ed. 177.

(a) *Oakley* v. *Ports. &c., Steam Packet Co.*, 11 Exch. 622; 25 Law J. Exch. 99.

(b) *Forward* v. *Pittard*, 1 T. R. 33; *Hyde* v. *Trent Nav. Co.*, 5 T. R. 399.

(c) Doct. & Stud. Dial. 2, ch. 38; Noy, ch. 43.

(d) *Dale* v. *Hall*, 1 Wils. 281.

defective packing, nor for losses occasioned by an inherent defect in the article causing its destruction. If, however, the defective packing of goods is patent and visible, and easily remedied, and he accepts the goods for conveyance, he is bound to take all reasonable means to provide against the defect, and secure their safety. Where a dog, with a string about his neck, was delivered to a common carrier to be carried, and was tied by the string in a watch-box, and shortly afterwards the dog slipped his head through the noose, and escaped, and was never seen afterwards, and an action was brought to recover the value of the dog, and it was contended that the owner ought to have taken care that the cord was properly secured round the dog's neck, it was held that as the common carrier had the means of seeing that the dog was insufficiently secured, he ought to have locked him up or taken other proper means to secure him, and that he was responsible for the loss (*e*). Where, however, a greyhound, secured in the way ordinarily adopted and obviously intended by the owner to be used, viz., by a collar and strap, was delivered to a railway company to be carried, and the greyhound during the journey slipped his head through the collar and was lost, it was held that the company was not responsible (*f*).

Common carriers are not responsible for the "inherent vice" of the goods which they carry, so that where animals are injured by their own acts and without any negligence on the part of the carrier, the carrier is not liable (*g*).

If a cargo or load of goods weighing a certain weight be delivered to a common carrier to be carried for hire, and the cargo on its arrival at its destination is deficient in weight, there is a *primâ facie* presumption of negligence on the part of the carrier, which the latter must rebut by showing that the deficiency of weight arose from causes over which he had no control (*h*).

If the accident or casualty causing the loss of the goods is occasioned by the misconduct of a third person, and not by any fault or neglect on the part of the common carrier himself, the latter is, nevertheless, responsible to the owner for the loss, as he has himself a remedy over against the offending party. Thus where the ship of a common carrier by water drove on an anchor in the river Humber, and was sunk, and the goods on board were injured, and the accident was occasioned by the neglect of a third person in not having his buoy out to mark the place where his anchor lay, it was held that the common carrier was nevertheless

(*e*) *Stuart* v. *Crawley*, 2 Stark. 324.

(*f*) *Richardson* v. *North East. Ry.*, L. R. 7 C. P. 75.

(*g*) *Blower* v. *G. W. Ry.*, L. R. 7 C. P. 655; *Kendal* v. *L. & S. W. Ry.*, L. R. 7 Ex. 373; *Gill* v. *Manchester, S. & L. Ry.*, L. R. 8 Q. B. 186.

(*h*) *Hawkes* v. *Smith*, Car. & M. 72.

bound to make good the loss (*i*). But if the misconduct of the third person is caused by the orders of the owner of the goods, the carrier of course will not be responsible (*k*).

If a man professes to be a common carrier of passengers merely, and only receives occasionally, and at his own option, some trifling articles of luggage with such passengers, to be carried gratuitously for the accommodation of the latter, he cannot be charged as a common carrier of goods for the loss of them. He is, in such a case, a gratuitous bailee of the goods, and chargeable only with the liabilities and responsibilities of a person who gratuitously undertakes to carry goods for another. Such is an omnibus proprietor, who professes only to carry passengers and receives his hire solely therefor, but occasionally receives and carries gratuitously small bundles and parcels for the accommodation of his passengers. As he does not profess to carry goods for hire, he cannot be compelled to receive them as a common carrier of goods, neither can he be charged except as a gratuitous bailee for the loss of them. And if luggage is carried free, upon the express terms that the passenger shall himself take charge of it, and that it shall be taken at his risk, he cannot make the carrier responsible for the loss of it (*l*). If however, the carrier or coach-proprietor professes to carry both passengers and luggage, he is clothed, as regards the conveyance of the luggage, with the obligations and responsibilities of a common carrier of goods for hire (*m*), whether the hire is paid by the passenger or by some other person on his behalf or for his benefit (*n*).

Contributory negligence.—If goods delivered to be carried are lost or stolen by the way, and the conduct of the bailor or consignor himself has conduced to the loss, he has no ground at common law for seeking compensation at the hands of the common carrier (*o*). Thus, where a man hid one hundred pounds sterling in some hay in an old nail bag, and delivered it to a common carrier to be carried to a banker, and the money was lost, it was held that the common carrier was not responsible for the loss, as the consignor had neglected to inform the carrier of the exceeding value of the bag, and had thereby prevented him from taking proper care of it (*p*).

So, where the consignor concealed a quantity of guineas in an ordinary brown paper parcel tied with a string (*q*), and a number

(*i*) *Trent Nav. Co.* v. *Ward*, 3 Esp. 130.

(*k*) *Butterworth* v. *Brownlow*, 34 Law J. C. P. 267.

(*l*) *Stewart* v. *Lond. & North West Ry. Co.*, 33 Law J. Exch. 199; as to passengers' luggage generally, see *post*, p. 544.

(*m*) *Brooke* v. *Pickwick*, 4 Bing. 218.

(*n*) *Marshall* v. *York and Newcastle Ry. Co.*, 11 C. B. 655; 21 Law J. C. P. 24.

(*o*) *Butterworth* v. *Brownlow*, *supra*.

(*p*) *Gibbon* v. *Paynton*, 4 Burr. 2298.

(*q*) *Clay* v. *Willan*, 1 H. Bl. 298.

of sovereigns in a packet of tea (r), and several hundred pounds' worth of bank-notes and gold in an ordinary school-boy's box, and the money so sent was lost by the way, it was held that the common carrier was not responsible for the loss of it (s). And if glass, or china, or fragile articles requiring great care for their safe conveyance, are put into boxes and packages and delivered to a carrier to be carried, and no notice is given to the latter of the peculiar nature of the contents of such packages, and of the additional care required for their safe conveyance, and the things are damaged in the course of the transit, the carrier is not bound to make good the damage, as the consignor has himself directly contributed to the injury by concealing the peculiar nature of the articles, and the amount of care requisite for their safe conveyance. Contributory negligence, it must be borne in mind, is that sort of negligence which being a cause of the injury, is of such a character that its effect could not have been counteracted or avoided by the ordinary care of the defendant (t). Contributory negligence in actions against carriers is frequently set up where the plaintiff alleged that he was injured in alighting from a train (u), or in getting his hand trapped upon entering the carriage (x), or while travelling from the flying open of the carriage door (y).

Limitation of the liability of common carriers by public notice.—Carriage of gold and silver, jewellery, title-deeds, glass, silk, &c.—As the common carrier was responsible at common law for the safe carriage of goods and merchandise, and was bound to make good losses by robbery, he was allowed to charge a rate of carriage proportioned to the risk he ran. This risk naturally depended upon the value of the articles he carried; and, therefore, when a common carrier was required to carry a bag of gold across Hounslow Heath, it was thought that he was justly entitled to charge more than the ordinary rate of remuneration for merchandise (z). "His warranty and insurance," observes Lord Mansfield, "are in respect to the reward he is to receive; and the reward ought to be proportionable to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, and be at the expense of more guards and other methods of security; and therefore he ought in reason and in justice to have a greater reward." "A higher price ought in

(r) *Bradley* v. *Waterhouse*, 3 C. & P. 318.

(s) *Batson* v. *Donovan*, 4 B. & Ald. 37; *Mayhew* v. *Eames*, 3 B. & C. 601; 5 D. & R. 487.

(t) See Horace Smith on Negligence, 150; *Radley* v. *L. & N. W. Ry.*, 1 Ap. Cas. 754; 46 L. J. 573; as to the negligence of a third party, see the above work, and *Ayles* v. *S. E. Ry. Co.*, L. R. 3 Ex. 146; *Daniel* v. *Met. Ry.*, L. R. 5 H. L. 45.

(u) See the cases, *ante*, p. 531.

(x) See the cases, *ante*, p. 531.

(y) *Adams* v. *L. & Y. Ry.*, L. R. 4 C. P. 739; *Gee* v. *Met. Ry.*, L. R. 8 Q. B. 161.

(z) *Tyly* v. *Morrice*, Carth. 480.

conscience to be paid him for insuring the safety of money, jewels, and valuable things, than for insuring common goods of small value" (a). Hence, when packages were brought to common carriers for conveyance, it became usual for the latter to ask the value, and to charge accordingly, and it was held that the owner was, in all cases, bound by his representation of value, and could not give evidence of the falseness of his own statement in order to throw an increased responsibility upon the common carrier. But the owner was not bound to declare the value of the parcel unless he was asked; if the common carrier asked no questions, and there was no fraud or intentional concealment to give the case a false complexion, the common carrier was responsible for the safety of the parcel, whatever might be its value (b).

To obviate the inconvenience of asking questions in each case, and the difficulty of proving the statements made on each occasion, common carriers resorted to the expedient of advertising in newspapers, and posting on the walls of their booking-offices, public notices, to the effect that they would not be liable for the loss of money and valuables enclosed in packages and parcels, unless they received notice of their existence, nor for the loss of ordinary goods and chattels beyond a certain amount, unless the value of such goods was declared and entered at the office, and an increased rate of remuneration paid for their conveyance. So long as these public notices and advertisements were used with the *bonâ fide* intention of protecting the common carrier against fraud on the part of persons sending packages of great value and small bulk for conveyance, and of securing to him a rate of remuneration proportioned to the value of the parcel and the risk he ran, they were encouraged and supported (c); but when they were used, as they soon were, for the purpose of enabling the common carrier altogether to shake off his common law responsibility, and of concealing and favouring fraud towards his customers, and shielding him from the consequences of his own negligence and misconduct, they were condemned and discouraged. All sorts of difficulties at last arose with respect to these notices. On some occasions they were held to be inoperative, because the party bringing the goods to the office where they were posted up was unable to read, and the notice consequently afforded him no information (d), or, being able to read, he never did read the notice (e); and it was sometimes held that the attention of the consignor of the parcel ought to be drawn to the printed terms of conveyance in such a

(a) Aston, J., 4 Burr. 2302, 2303.

(b) *Riley* v. *Horne*, 2 M. & P. 340.

(c) *Gibbon* v. *Paynton*, 4 Burr. 2301; *Harris* v. *Packwood*, 3 Taunt. 264; *Marsh* v. *Horne*, 5 B. & C. 326.

(d) *Davis* v. *Willan*, 2 Stark 280.

(e) *Kerr* v. *Willan*, ib. 44; *Butler* v. *Heane*, 2 Campb. 415.

way that, if he remained in ignorance of them, such ignorance was wilful or attributable to his own negligence (*f*).

The contradictory decisions upon the proof and effect of these notices, and the confused state of the law respecting them, at last rendered the interference of the legislature necessary in order to protect the common carrier, on the one hand, from fraud and concealment on the part of the consignor of parcels and packages, and to protect the consignor, on the other, from fraud, negligence, and misconduct on the part of the common carrier.

Common Carrier's Act—Declaration of value by consignors.—The 11 Geo. 4 and 1 Wm. 4, c. 68, commonly called the Carrier's Act, by sect. 1, exempts common carriers by land from liability for the loss of (*g*), or injury to, gold or silver, precious stones, jewellery, watches, clocks, trinkets, bills, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, paintings (*h*), engravings, pictures (*i*), plated articles, glass (*k*), china, silks (*l*), in a manufactured or unmanufactured state, furs, lace (*m*), wrought up or not wrought up with other materials (*n*), contained in any parcel or package which shall have been delivered either to be carried for hire or to accompany the person of any passenger in any public conveyance, when the value of such articles or property contained in such parcel or package shall exceed the sum of TEN POUNDS, unless, at the time of the delivery thereof for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such articles or property shall have been DECLARED by the person sending or delivering the same, and the increased charge thereinafter mentioned (sect. 2), or an engagement to pay the same, accepted by the person receiving such parcel or package. Pictures placed in a waggon with wooden sides, but without a top, so that they could be seen to be pictures, but their exact character could not be seen, were held to be contained in a parcel or package (*o*). Mere mention of the value to a station-master is

(*f*) *Clayton* v. *Hunt*, 3 *ib* 27; *Gouger* v. *Jolly*, Holt, 317; *Walker* v. *Jackson*, 10 M. & W 173; *Brooke* v *Pickwick*, 4 Bing. 222; see cases as to these points, *post*, p. 544, Passengers' luggage.

(*g*) *Hearn* v. *Lond. & S. W. Ry. Co*, 10 Exch. 801; 24 L. J. Ex. 180.

(*h*) *I.e.*, paintings which are works of art, see *Woodward* v. *L. & N. W. Ry.* 3 Ex. D. 121.

(*i*) Where framed pictures are sent by a carrier, the frames as well as the pictures are within the Act; *Henderson* v. *London & North Western Ry. Co.*, L. R. 5 Ex. 90.

(*k*) As to a glass frame, see *Treadwin* v *Gt Eastern Ry*, L R 3 C. P 308.

(*l*) Silk guards and silk dresses are included under the term silks, *Bernstein* v *Baxendale*, 6 C B N S 259; 28 L. J C P 265, overruling *Davey* v. *Mason*, Car & M 50, so, also, is elastic silk webbing, made as described in *Brunt* v. *The Midland Ry. Co*, 2 H. & C. 889; 33 L J. Ex 187.

(*m*) By the 28 & 29 Vict. c. 94, s. 1, the term "lace" is not to include machine-made lace.

(*n*) See *Brunt* v. *Mid Ry*, *supra*.

(*o*) *Whaite* v. *L. & Y. Ry. Co.*, L. R. 9 Ex. 67.

no declaration of value within the meaning of the Act, if it was not intended to operate as a declaration of value (*p*). When the declaration is formally made, the carrier is entitled, if the value exceeds 10*l.*, and he has a notice of the increased rate of charge for parcels exceeding the value of 10*l.* stuck up in his office, to demand the increased rate of charge; but, if he does not think to notify the increased rate of charge, he cannot demand it; and, if he has notified it, but fails to demand it, he must be taken to have received the goods subject to his common law liability as an insurer of their safe conveyance, and will not be entitled to the protection of the statute (*q*). The consignor is bound by his declaration, and cannot afterwards show that the value of the goods exceeded that declared (*r*). If the journey is to be performed partly by land and partly by sea, the contract is divisible, and the carrier is entitled to the protection of the Merchant Shipping Acts, as far as the journey is to be performed by sea (*s*), and to the protection of the Carrier's Act so far as it is to be performed by land (*t*); and he will not lose such protection by having received the goods under a special contract, unless its terms are inconsistent with the goods having been received by him in his capacity of a common carrier (*u*).

Of the fixing up of notices required by the statute.—By (s. 2) when any parcel or package containing any of the specified articles shall be delivered, and its value and contents declared, and such value shall exceed ten pounds, it shall be lawful for such common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or receiving-house where such parcels are received by them for the purpose of conveyance, stating the increased rate of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles, and all persons sending or delivering parcels containing such valuable articles at such office shall be bound by such notice, without further proof of the same having come to their knowledge. By (s. 3) when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same

(*p*) *Robinson* v. *S. W. Ry. Co.*, 19 C. B. N. S. 51; 34 L. J. C. P. 235.

(*q*) *Behrens* v. *Gt. North. Ry. Co.*, 30 L. J. Ex. 153; 31 L. J. Ex. 299; 7 H. & N. 950.

(*r*) *M'Cance* v. *Lond. & N. W. Ry. Co.*, 3 H. & C. 343; 34 L. J. Ex. 39.

(*s*) *London & S. W. Ry. Co.* v. *James*, L. R. 8 Ch. 241; 42 L. J. Ch. 337.

(*t*) *Le Conteur* v. *London & S. W. Ry. Co.*, 6 B. & S. 961; L. R. 1 Q. B. 54; 35 L. J. Q. B. 40.

(*u*) *Baxendale* v. *The Great Eastern Ry. Co.*, L. R. 4 Q. B. 244; 38 L. J. Q. B. 137.

shall have been accepted, the person receiving such increased rate of charge, or accepting such engagement, shall, if required, sign a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice shall not have been affixed, the common carrier shall not be entitled to any benefit or advantage under the Act, but shall be responsible as at common law, and be liable to refund the increased rate of charge. No public notice or declaration is (s. 4) to limit, or in anywise affect the liability at common law of any such common carriers.

Every office, warehouse, or receiving-house, which shall be used or appointed by any common carrier, for the receiving of parcels to be conveyed, is (s. 5) to be deemed and taken to be the receiving-house, warehouse, or office of such common carrier. And where any parcel shall have been delivered at any such office, and the value and contents declared, and the increased rate of charge paid, and such parcel shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled (s. 7) to recover back such increased charges, in addition to the value of such parcel.

Nothing in the Act is (s. 6) to annul or affect any special contract between such common carriers and any other parties for the conveyance of goods and merchandise;—but this section only applies to contracts, the provisions of which are inconsistent with the exemption claimed by the carrier under the first section (*u*); nor (s. 8) to protect any common carrier for hire from liability to answer for loss or injury to any goods or articles arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

The fourth section of the Carrier's Act (cited *supra*) enacts that no public notice or declaration shall be deemed or construed to limit, or in anywise affect, the liability at common law of any common carriers in respect of any articles or goods to be carried or conveyed by them, but that they shall be liable, as at common law, to answer for the loss of, or injury to, any articles and goods in respect whereof they may not be entitled to the benefit of that Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding. But nothing contained in the Act is (s. 6) to annul or in anywise affect any special contract between common carriers

(*u*) *Baxendale* v. *Gt. Eastern Ry.*, *supra*.

and any other parties for the conveyance of goods and merchandise. This statute is confined to public notices, such as were very common before the Act—notices addressed to the public at large, raising a question in every case whether the notice was brought home to the particular person. It is not applicable to a notice specifically delivered to form the basis of a special contract with him (*y*). Where the common carrier is not a common carrier of the particular description of goods tendered him for conveyance, and has the option of receiving them or rejecting them at his own good will and pleasure, he may prescribe his own terms of conveyance; and, if the party delivering goods to be carried has been personally served with a notice of the terms on which the common carrier carries goods, and after seeing the notice sends the goods, he must be taken to agree that they shall be carried on those terms, and there is then a special contract between him and the common carrier for their conveyance (*z*), unless the carriage is by railway or canal so as to necessitate a signed special contract under the Railway and Canal Traffic Act (*a*). But this is not the case with regard to such articles as the common carrier is bound by his public profession and employment to carry. With regard to them, the owner has a right to insist that the common carrier shall receive the goods subject to all the responsibilities incident to his employment (*b*). "If the delivery of goods under such circumstances authorises an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier" (*c*). A remover of furniture for hire is not generally as it should seem a common carrier, and at all events where a special contract is entered into between the owner of the furniture and the carrier, it would exclude any question of liability as a common carrier (*d*). Special contracts with railway and canal companies must, as we shall presently see, be authenticated by a signed writing (*post*, p. 555). If the consignor of packages exceeding 10*l*. in value, containing the valuable articles specified in the Carrier's Act, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the common carrier may, if he pleases, waive his right to the increased remuneration or premium

(*y*) *Walker* v. *York & North Mid. Ry. Co.*, 2 Ell. & Bl. 761; *Van Toll* v. *South Eastern Ry. Co.*, 31 L. J. C. P. 241.

(*z*) Wightman, J., 2 Ell. & Bl. 760.

(*a*) *Post*, p. 555.

(*b*) Ld. Kenyon, *Kirkman* v. *Shawcross*, 6 T. R. 17; *Garton* v. *Brist. & Ex. Ry. Co.*, 1 B. & S. 162; 30 L. J. Q. B. 276.

(*c*) *Hollister* v. *Nowlen*, 19 Wend. 247; *New Jersey St. Nav. Co.* v. *Merchts. Bank*, 6 How. 344; *Crouch* v. *London & North West. Ry. Co.*, 23 L. J. C. P. 73.

(*d*) *Scaife* v. *Farrant*, L. R. 10 Ex. 358.

of insurance, and agree to carry for a smaller sum, upon the terms that he is not then to be responsible upon the extended customary liability of a common carrier as an insurer against robbery and the dangers and accidents of the road. "This limitation," observes Parke, B., "it is competent for a common carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law and insist upon his own terms" (e).

Common carriers may protect themselves by special contract from loss by fire and sea risks, and may carry goods on the terms that they are not to be held responsible at all for such losses (f).

Stipulations exempting common carriers by water from loss of luggage, unless a bill of lading has been signed for it.— Where the Atlantic Mail Steam Navigation Company issued passengers' tickets on which was printed a notice or condition "that the ship will not be accountable for luggage, goods, or other descriptions of property, unless bills of lading have been signed therefor, each passenger allowed twenty cubic feet of luggage free," it was held that the company had a right to impose this condition on their passengers, provided it was imposed upon all alike; that the passenger, therefore, was bound to get a bill of lading for all the luggage for which he intended to make the ship accountable, but that he had the option of taking luggage under his own personal control without any bill of lading, carrying it, in that case, at his own risk (g). If the company does not impose the same terms upon all passengers alike, or the passenger offers to sign a bill of lading and is unable to obtain it, the company cannot avail themselves of the condition as protecting them from liability (h).

When the carrier may by special contract exempt himself from all responsibility for damage to certain classes and descriptions of goods in transitu.—Whenever a man enters into a contract for the carriage of goods, he impliedly grants or lets out some labour and care for the accomplishment of the work of carrying, in return for the hire paid or agreed to be paid him; and it was formerly held that he could not enter into the contract, and at the same time say that he would bestow no labour or care at all in and about the performance of what he had undertaken to do, and for which he received his hire. "It is impossible," justly observes Lord Ellenborough, "without outraging common sense, so

(e) *Wyld* v. *Pickford*, 8 M. & W. 458.

(f) *Maving* v. *Todd*, 1 Stark. 74; *Collins* v. *Brist. & Ex. Ry. Co.*, 11 Exch. 790; 7 H. L. C. 205.

(g) *Wilton* v. *Royal Atl. Mail St. Nav. Co.*, 10 C. B. N. S. 453; 30 L. J. C. P. 369.

(h) *Gt. West. Ry. Co.* v. *Goodman*, 12 C. B. 313

to construe a special contract for the carriage of goods, as to make the carrier say, 'We will receive your goods; but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious'" (*i*). "If the carrier should perchance refuse to carry the stuffe, unless promise were made unto him that he should not be charged for any misdemeanour that should be in him, the promise were void; for it were against reason and against good manners; and so it is in all other cases like" (*k*). In the case of articles of a perishable nature, such as fish, or of a very delicate and fragile nature, such as statuary, sculptured alabaster, or marble, which the common carrier does not commonly profess to carry, and which may be readily injured, nobody knows how, the common carrier may, as we have seen, refuse to receive and carry such articles, except under a special contract exonerating him from all responsibility for damage done to them *in transitu* not occasioned by the neglect or default of himself or his servants (*l*). So, with regard to horses, it is said to be very reasonable that common carriers by railway should be allowed to make agreements for the purpose of protecting themselves against the peculiar risks attendant upon the carriage of horses by railway, arising from the rapid motion and strange noises, which are calculated to alarm horses and cause them to kick and break the carriage, and do themselves injury. It was, therefore, held, before the passing of the Railway and Canal Traffic Act (*post*, p. 555), that railway companies might, by special contract, throw the risk of the conveyance of a horse by railway upon the owner of the horse, so that, if the horse was injured in the transit from any ordinary railway casualty, the owner would have no remedy against the company for the loss (*m*).

The notices commonly given by common carriers before the passing of the Carrier's Act, that they would not be responsible for the loss of or damage to parcels above a certain value, unless the value was declared and a premium of insurance paid, were held to apply only to the responsibilities and liabilities of the carrier as an INSURER of the safety of the goods, and did not and could not exempt him, in the absence of fraudulent concealment of value or risk on the part of the consignor, from the consequences of his own misconduct or negligence, or from the misconduct and negligence

(*i*) *Lyon* v. *Mells*, 5 East. 438.

(*k*) Doct. & Stud. Dial. 2, ch. 39; Noy's Maxims, ch. 43, 92.

(*l*) *Beal* v. *South Devon Ry. Co.*, 5 H. & N. 875; 29 L. J. Ex. 441: *Peek* v. *North Staff. Ry. Co.*, 32 L. J. Q. B. 241; *Leeson* v. *Holt*, 1 Stark. 186.

(*m*) *Carr* v. *Lanc. & York. Ry. Co.*, 7 Exch. 714; *Harrison* v. *Lond. Br. & S. Co. Ry. Co.*, *ante*, p. 754, over-ruled by *Peek* v. *North Staff. Ry. Co.*, 32 L. J. Q. B. 241.

of his servants and persons in his employ (n). "By understanding the terms of the notice in this limited sense," observes Bayley, J., "the common carrier will be exempt from those peculiar liabilities which attach to him only in his character of common carrier, but not from the consequence of his own misfeazance, for which every bailee is responsible" (o). Having, by notice or special contract, divested himself of his customary liability of an insurer against robbery and fire and the dangers and accidents of the road, "he still," observes Parke, B., "undertakes to carry from one place to another, and for some reward in respect of the carriage, and is therefore bound to use ordinary care in the custody of the goods, and their conveyance to, and delivery at, the place of destination, and in providing proper vehicles for their carriage" (p). Where a cask of brandy of the value of £70 was accepted by a common carrier to be carried for hire, and the cask began to leak on the road, and the carrier's servant was told that the brandy was escaping, but he made no attempt to stop the leak and save the brandy at any of he stages at which he stopped, although he might easily have done so, and the brandy was consequently lost, it was held that the carrier was not protected from the consequences of the negligence of his servant by having given notice to the consignor that he would not be answerable for any goods of what nature or kind soever above the value of £5, if lost, stolen, or damaged, unless a special agreement was made and an adequate premium paid over and above the common carriage; for here the goods were of large bulk and known quality, and the value was obvious as well as the degree of care reasonably requisite for their conveyance (q).

Void limitations of liability.—A person who undertakes the public employment of a common carrier of merchandise or of passengers and luggage has no more right, it is apprehended, to engraft upon his contract or employment the terms that "all merchandise received by him to be carried is carried at the risk of the owners," or that "all luggage delivered to him by his passengers is carried at the risk of the passengers," and that "he will not be responsible if it is lost or damaged by the way," than a common innkeeper has to refuse to receive guests, except on the terms that he shall not be responsible for the safe keeping of their goods and luggage deposited in his inn. The consignor of merchandise or the passenger has a right to reject these terms, and to insist that merchandise, such as is

(n) *Birket* v. *Willan*, 2 B. & Ald. 356; *Duff* v. *Budd*, 6 Moore, 477.

(o) *Garnett* v. *Willan*, 5 B. & Ald. 57.

(p) *Wyld* v. *Pickford*, 8 M. & W. 461; *Smith* v. *Horne*, 8 Taunt. 144; 2 Moore, 18.

(q) *Beck* v *Evans*, 16 East, 247; *Smith* v. *Horne*, 8 Taunt. 144; 2 Moore, 18.

ordinarily carried by the common carrier, or the customary allowance of luggage for a passenger, shall be taken at the common carrier's risk, provided the consignor makes the declaration of value, and is ready to pay the premium of insurance, in those cases where the declaration and payment are required by law. "The traveller," observes an American judge, "is under a sort of moral duress, a necessity of employing the common carrier; and the latter shall not be allowed to throw off his legal liability. He shall not be privileged to make himself a common carrier for his own benefit and a mandatary or less to his employer. He is a public servant, with certain duties defined by law; and, as Ashurst, J., said of the duties of innkeepers, they are '*indelible*'" (r). But in our own law, where the carriage of particular articles is attended with any peculiar or extraordinary risk, the common carrier is entitled, as we have seen, to refuse to receive and carry such articles, unless the nature and value of the articles are declared, and an increased charge paid for insurance; but he may, at the same time, receive and carry them under a special contract, providing that they shall be carried at the risk of the owner at a lower rate of charge (*ante*, p. 540). And, if he is a common carrier of passengers merely, and does not profess to carry and does not receive for carriage luggage with his passengers, but allows them to carry with them, under their own care, a small quantity of personal luggage, he is not responsible for the loss of it (s). Where the carrier seeks to set up a special contract limiting his liability, he must show that the terms of it have been brought to the consignor's notice. The most frequent illustrations of this are to be found in the conditions printed upon luggage tickets (t), where the luggage is left in the cloak-room, the railway company being no longer carriers but warehousemen. Where a passenger took a ticket in the form of a book of coupons, and inside the book was a condition limiting the responsibility of the company to their own trains, and the passenger was injured in France, the jury found that the condition was not brought to his notice; but it was held that the whole book was the contract, and was accepted by the passenger, and he was bound by the condition (u).

Loss of passengers' luggage by railway companies.—The impossibility of travelling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveller, has led from the earliest times to the practice, on the

(r) Cowen, J., *Cole* v. *Goodwin*, 19 Wend. 281; *Hollister* v. *Nowlen*, *ib.* 234; Angell on Carriers, App. xviii., xxiii.

(s) See *infra*.

(t) See *infra*.

(u) *Burke* v. *S. E. Ry.*, 5 C. P. D. 1, distinguishing *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470.

part of the carriers of passengers for hire, of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger.

Under the older system of travelling by stage-coaches, canal-boats, or other vessels, the amount of luggage to be thus carried free of charge was commonly made part of the contract by express stipulation or notice from the carrier. Under the modern system of railway conveyance, it is fixed and regulated by the various Acts of Parliament under which railways have been established. By these Acts the right of the passenger is expressly limited to ordinary luggage, which must be taken to mean the personal luggage of the traveller; and the amount which he is entitled to take free of charge is ascertained. Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, must be considered as personal luggage; this would include not only all articles of apparel whether for use or ornament, but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying (x). On the other hand, what is carried for the purposes of business, such as merchandise or the like (y), or for larger or ulterior purposes than those of the journey, such as articles of furniture or household goods (z), will not come within the description of ordinary luggage; unless the company (with knowledge) choose to take without extra payment that which is not ordinary luggage, in which case they will be responsible for the loss (a); so also upon any limit in point of weight, if the company choose to allow a passenger to carry more, they will be liable (a). The liability of common carriers in respect of articles carried as passenger's luggage, is that of carriers of goods as distinguished from that as of carriers of passengers. Most of the Railway Acts provide that, without extra charge, it shall be lawful for every passenger by railway to take with him ordinary luggage or articles of clothing

(x) *Macrow* v. *Great Western Ry. Co.*, L. R. 6 Q. B. 612; 40 L. J. Q. B. 300.

(y) *Cahill* v. *London & North Western Ry. Co.*, 13 C. B. N. S. 818; 31 L. J. C. P. 271; *Great Northern Ry. Co.* v. *Shepherd*, 8 Exch. 30; 21 L. J. Ex. 286; *Belfast & Ballymena Ry. Co.* v. *Keys*, 9 H. L. C. 556.

(z) *Hudston* v. *Midland Ry. Co.*, L. R. 4 Q. B. 366; 38 L. J. Q. B. 213.

(a) *Great Northern Ry. Co.* v. *Shepherd*, 8 Exch. 30; 21 L. J. Ex. 271.

of a certain weight and dimensions, and that the company shall not be responsible for the safe carriage or custody of, or for any loss of or injury to, articles carried upon the railway with, or accompanying the person of, or belonging to, any passenger, or delivered for the purpose of being carried, other than such passenger's articles of clothing. But these enactments do not prevent railway companies from running excursion trains for passengers only, without luggage (*b*). If a railway company starts an excursion train for passengers merely, but allows each passenger to carry with him a small quantity of luggage free at his own risk, and passengers avail themselves of the privilege, and the luggage is lost, the company is not responsible for the loss of it (*c*). Where a railway company made a bye-law to the effect that they "would not be responsible for the care of luggage, unless booked and paid for," it was held that the bye-law was null and void (*d*). Railway companies are responsible for the acts and omissions of their porters in the management and delivery of passengers' luggage (*e*). But, if a passenger packs merchandise in carpet-bags and portmanteaus, and passes it off as luggage, he cannot recover for the loss of it, as he is guilty of an unfair concealment towards the company, in preventing them from making the charge they would be entitled to make for the carriage of merchandise (*f*). A railway company is, in general, liable for the loss of a passenger's luggage, though carried in the carriage in which he himself is travelling (*g*). But the passenger must take ordinary care of it; and, therefore, where the passenger left the carriage in which his luggage was for another in the course of the journey, and his portmanteau was stolen, it was held that the company was not responsible (*h*).

Where the passenger retains his own personal control over the luggage, the company are no longer insurers of its safety, but are liable for negligence only (*i*). Where luggage is received as luggage of a servant, but it turns out to be the master's, who is following by another train, the company are not liable for the

(*b*) *Rumsey* v. *North Eastern Ry. Co.*, 14 C. B. N. S. 461; 32 Law J. C. P. 244.

(*c*) *Stewart* v. *Lond. & N. West. Ry. Co.*, 33 L. J. Ex. 199; 3 H. & C. 135.

(*d*) *Williams* v. *Gt. West. Ry. Co.*, 10 Exch. 15; *Munster* v. *S. E. Ry.*, 4 C. B. N. S. 698.

(*e*) *Mid. Ry. Co.* v. *Bromley*, 17 C. B. 375; 25 L. J. C. P. 94.

(*f*) *Cahill* v. *Lond. & North-West. Ry. Co.*, 13 C. B. N. S. 818; 31 L. J. C. P. 271; 30 *ib.* 294: *Belfast & Ballymena Ry. Co.* v. *Keys*, 9 H. L. C. 556; *Great Northern Ry. Co.* v. *Shepherd*, 8 Exch. 30; 21 L. J. Ex. 286.

(*g*) *Le Conteur* v. *London & South Western Ry. Co.*, L. R. 1 Q. B. 54; 6 B. & S. 961; 35 L. J. Q. B. 40.

(*h*) *Talley* v. *Great West. Ry. Co.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9; with respect to luggage deposited in a cloak room, see *Burke* v. *S. E. Ry.*, L. R. 5 C. P. D. 1; 49 C. P. D. 107.

(*i*) *Talley* v. *G. W. Ry.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9; *Bergheim* v. *Gt. Eastern Ry.*, 3 C. P. D. 221; see as to where luggage is in his control, *Richards* v. *L. B. & S. C. Ry.*, 7 C. B. 839; *Kent* v. *Mid. Ry.*, L. R. 10 Q. B. 1; 44 L. J. Q. B. 18; *Mid. Ry. Co.* v. *Bromley*, 17 C. B. 372

loss (*k*). Upon the arrival of the passenger at the station, the company must deliver his luggage on the platform, allowing him a reasonable time to come and receive it (*l*). If a railway porter, at the request of a passenger, calls a cab, and places the passenger's luggage on a cab, and there leaves it, and comes away without having the means of identifying the vehicle, and the cab-driver goes off with the luggage before the passenger has taken his seat in the vehicle, the railway company will be responsible for the loss (*m*). Passenger's luggage is within s. 7 of the Railway and Canal Traffic Act (*n*).

Charge for luggage by excursion trains.—Where a passenger by an excursion train, knowing that the railway company did not allow passengers to carry luggage by such trains, nevertheless secretly put luggage into the train, it was held that the law would imply a promise from the wrongdoer to pay the company for the carriage of it (*o*).

When a declaration of value is a condition precedent to any liability on the part of the common carrier.—The Act, it will be observed, applies solely to common carriers *by land*. Where, however, the contract for carriage is divisible, and applies to carriage partly by water and partly by land, and the loss occurs during the carriage by land, the carrier is entitled to the benefit of the statute (*p*); and where the contract is to carry by land and sea also, it is divisible, so as to afford a defence to the carrier if the loss in fact occurs during the carriage by land (*q*). The effect of the Act is to prevent the owner or consignor from recovering from the common carrier the value of any of the enumerated articles when the value of the contents of the parcel or package in which they are inclosed exceeds 10*l.*, and the value has not been declared, and the increased rate of charge paid by the consignor pursuant to the statute. The declaration of value must be made by the consignor, whether the common carrier has or has not a notice or tariff of charges for the increased risk of conveyance of such articles stuck up in his office, and whether the articles are delivered at the office of the common carrier, at the sender's house, on the road, or anywhere else. The Act requires the person who sends the goods to take the first step, by giving that information which he alone can give, and if he does not take that first step, then he cannot maintain an action for the value of the lost article by reason of the

(*k*) *Beecher* v. *G. E. Ry.*, L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.

(*l*) *Patscheider* v. *G. W. Ry.*, 3 Ex. D. 153.

(*m*) *Butcher* v. *Lond. & South West. Ry. Co.*, 16 C. B. 13; 24 Law J. C. P. 137; *Richards* v. *London, Brighton & South Coast Ry. Co.*, 7 C. B. 839.

(*n*) *Cohen* v. *S. E. Ry.*, 2 Ex. D. 253; see *post*, p. 560.

(*o*) *Rumsey* v. *N. E. Ry.*, 32 L. J. C. P. 245; 14 C. B. S. 641.

(*p*) *Baxendale* v. *Gt. Eastern Ry. Co.*, *ante*, p. 538

(*q*) *Le Conteur* v. *Lond. and South-West. Ry. Co.*, *ante*, p. 546.

first section of the statute, which expressly says that the common carrier shall not be liable unless the declaration is made (r). As soon, however, as this has been done, the common carrier is entitled to demand and to have an increased rate of remuneration, which is in the nature of a premium for insurance, provided he has a tariff or notice stuck up in his office of the sums he charges above the usual rate of charge for the carriage of the articles. If there is no tariff, he has then no right to charge the increased rate, and he loses (provided the declaration of value has been duly made by the consignor) the protection of the Act (s). The declaration of value having been made, the common carrier has no right to know the exact nature of the contents of the parcel, unless he has reasonable grounds for believing that it contains articles of a dangerous character (t). And if, after the declaration has been made, he receives the goods without demanding an increased rate of charge, he is not protected by the statute (u). However, the mention of the value incidentally is no declaration of value within the statute (x).

By whom the declaration of value is to be made and the increased rate of carriage paid.—In a case before Lord Ellenborough, before the passing of the Common Carrier's Act, it was held that where a tradesman at Gosport received an order in writing for goods to be forwarded to Plymouth, he had an implied authority to do all that was necessary to be done to insure them a safe conveyance; and, therefore, that when it was necessary to declare their value, and pay an increased charge for insurance, it was his duty to make the declaration and the payment, so as to enable the consignee, in case of loss, to secure his indemnity from the common carrier (y); but the limitation of the liability of common carriers in respect of the carriage of glass, china, and the articles mentioned in the Carrier's Act, being now established by Act of Parliament, must be taken to be known to consignees and consignors alike throughout the kingdom; and it is not the practice, nor, it is apprehended, is it in general the duty, of the consignor, to pay the carriage and insure articles directed to be forwarded by his customers, unless he receives express directions so to do (z). If indeed, the articles are of an extremely fragile character, and likely to be damaged without great care, or if they are of unusual value, it would be the duty of the consignor to declare their nature

(r) *Pianciani* v. *Lond. and South-West. Ry. Co.*, 18 C. B. 226.

(s) *Baxendale* v. *Hart*, 21 Law J. Exch. 123; 6 Exch. 789.

(t) *Crouch* v. *Lond. and North-West. Ry. Co.*, 14 C. B. 295; 23 Law J. C. P. 73; see *ante*, p. 525.

(u) *Behrens* v. *Gt. North. Ry. Co.*, 31 Law J. Exch. 299; 30 *ib.* 153.

(x) *Robinson* v. *South-West. Ry. Co.*, 34 Law J. C. P. 234.

(y) *Clarke* v. *Hutchins*, 14 East, 476.

(z) *Coshay* v. *Tute*, 3 Campb. 129; *Bailey* v. *Sweeting*, 9 C. B. N. S. 857.

and value to the common carrier, that proper care might be taken of them (*ante*, p. 534); and it would be prudent for the consignor, before forwarding goods of this description, to require instructions from the consignee as to the insurance of them.

Articles to which the statute extends (a).—The statute extends to all the articles enumerated in the first section, although not within the words of the preamble, "an article of great value in a small compass." It is not sufficient for the owner to describe in writing on the outside of a parcel or box the nature of the contents. The carrier must have distinct information thereof, and an opportunity of demanding the increased rate of carriage (b). Hat bodies made of felt, which is a substance composed partly of the soft fur or down of the rabbit detached from the skin, and partly of the wool of sheep, have been held not to be "furs" within the Common Carrier's Act (c), but dresses of silk made up for use are silks within the operation of the Act (d); and "silk web," which is composed one third of silk and two thirds of cotton and india-rubber, as being "wrought up with other materials," is also within it (e). By the term "writings" is meant writings of value, and therefore an instrument in writing in an imperfect state, intended to secure a large sum of money, but not being a valid and complete security at the time of the loss, is not within the statute (f). If the contents of a parcel or package exceeding 10*l.* in value are of a miscellaneous character, consisting partly of enumerated articles and partly of things not mentioned or comprised in the Act, the common carrier is released from all liability in respect of the former, but, as regards the latter, his common-law liability remains the same as before the passing of the statute. Thus, if a trunk containing linen and wearing apparel, jewellery, and trinkets, exceeding 10*l.* in value, be delivered to a carrier to be carried for the ordinary hire, or to accompany the person of a passenger, and such trunk is lost by the way, the carrier is not liable for the value of the jewellery and trinkets (g), but he remains responsible for the value of the trunk and linen and wearing apparel, as at common law before the passing of the Act. If, however, the contents of the parcel or package consist entirely of the enumerated articles, the common carrier is by the express terms of the Act freed from all responsibility and liability in respect of the loss thereof, if the con-

(a) See also the notes to the section, *ante*, p. 537.

(b) *Owen* v. *Burnett*, 2 C. & M. 353; 4 Tyr. 133; *Boys* v. *Pink*, 8 C. & P. 361.

(c) *Mayhew* v. *Nelson*, 6 C. & P. 58.

(d) *Bernstein* v. *Baxendale*, 6 C. B. N. S. 259; 28 Law J. C. P. 265, overruling *Davey* v. *Mason*, Car. & N. 50.

(e) *Brunt* v. *Mid. Ry. Co.*, 33 Law J. Exch. 187; 2 H. & C. 889.

(f) *Stoessiger* v. *South East. Ry. Co.*, 23 Law J. Q. B. 293; as to pleading the Act, see *Smith* v. *Lond. and Brighton Ry. Co.*, 7 C. B. 789.

(g) *Bernstein* v. *Baxendale*, *supra*.

signee has not declared the nature and value of the article, and paid, or agreed to pay, the increased charge specified in the notice, although the loss may have been occasioned by the grossest negligence (*h*). If an uninsured parcel or package consists entirely of enumerated articles, the plaintiff would not be entitled to recover even the value of the box or case in which they are contained (*i*), but if there are articles in it to which the statute does not apply he would (*k*).

If the consignor, after he has made the declaration of value, objects to pay the *ad valorem* rate of carriage or premium of insurance, and wishes to have the parcel carried as a parcel of ordinary value, at the ordinary rate of carriage for parcels of similar bulk and weight, the carrier may, if he pleases, waive his right to the increased remuneration or premium of insurance, and agree to carry for a smaller sum, upon the terms that he is not then to be responsible upon the customary liability of a common carrier, as an insurer against robbery and the dangers and accidents of the road. "This limitation," observes Parke, B., "it is competent for a common carrier to make, because, being entitled by common law to insist on the full price of carriage being paid beforehand, he may, if such price be not paid, refuse to carry upon the terms imposed by the common law, and insist upon his own terms" (*l*). And if, after the declaration has been made, the carrier receives the parcel without demanding the increased rate or charge, he receives it as an insurer of its safe conveyance; and the same result follows if he has failed to notify his increased rate of charge in accordance with the terms of the statute (*m*).

Losses covered by the statute.—The term "loss" in the statute means loss of things by the carrier, or his servants, in the course of the carriage of them, either by losing them from their vehicles, or mislaying them, so that it was not known where to find them when they ought to have been delivered; and not the loss that may be sustained by an owner or consignee by reason of the non-delivery of the chattel in due time, or by reason of great delay in its delivery, whereby the use of the chattel, or the means of turning it to advantage, were lost (*n*).

Loss of goods from theft by the common carrier's servants.—Nothing contained in the Carrier's Act is, as we have seen (s. 8), to protect any common carrier for hire from liability to answer for

(*h*) *Hinton* v. *Dibbin*, 2 Q. B. 646.

(*i*) *Wyld* v. *Pickford*, 8 M. & W. 462.

(*k*) *Treadwin* v. *Gt. East. Ry. Co.*, L. R. 3 C. P. 308; a framed picture is one entire thing, and cannot be divided so as to charge the carrier for the loss of the frame, *Henderson* v. *L. & N. W. Ry.*, L. R. 5 Exch. 90.

(*l*) *Wyld* v. *Pickford*, *supra*.

(*m*) *Behrens* v. *Gt. North. Ry. Co.*, 6 H. & N. 366; 30 Law J. Exch. 153.

(*n*) *Hearn* v. *Lond. and South West. Ry. Co.*, 10 Exch. 801; 24 Law J. Exch. 180.

loss of, or injury to, any goods or articles arising from the felonious act of any servant in the carrier's employ. If, therefore, the common carrier relies upon the statute as a defence, contending that there ought to have been, and that there was not, any declaration of value on the part of the consignor, of the article alleged to have been lost, the defence is rebutted, and the case taken out of the operation of the statute, by showing that the loss arose from the felonious act of the carrier's servant (*o*).

When the goods have been accepted by a carrier under a special contract for the carriage of them, the statute does not apply. Where, therefore, a common carrier has given express notice to the consignor that he will not be responsible for parcels or packages above the value of 10*l.*, unless the value is declared, and an increased rate of remuneration paid according to a printed tariff or scale of charge, and the common carrier afterwards accepts a parcel to be carried, knowing it to be worth more than 10*l.*, without demanding or receiving the premium for insurance, and the parcel is purloined by his own servant, he is not necessarily responsible for the theft (*p*). Having received the goods under a special contract, and not upon his customary liability as an insurer of safe conveyance, he is chargeable only for negligence and want of ordinary care. The loss by theft indeed is *primâ facie* proof of negligent keeping, but it is not absolutely conclusive, and the carrier may exonerate himself from liability for the theft by proving his own care and watchfulness, and showing that there was no want of any proper precaution on his part to guard against theft by his servants. "If the consignor," observes Lord Tenterden, "has concealed the value of the parcel from the carrier, and has adopted a disguise for it likely to prevent the carrier from taking any particular care of the parcel, and yet not so completely concealing its nature as to prevent it from being selected for depredation by a dishonest servant, and the loss is the consequence of the means he has adopted, then he cannot maintain an action in respect of the loss" (*q*).

In order to establish the fact of theft by the common carrier's servants, it is not enough that there is a greater degree of probability that the carrier's servants took their goods than that a stranger took them by reason of their greater facility of access and opportunities of stealing them (*r*). It is not necessary, however, to show that some particular servant has committed a felony; it is

(*o*) *Metcalfe* v. *London and Brighton Ry. Co.*, 4 C. B. N. S. 307; 27 Law J. C. P. 205.

(*p*) *Butt* v. *Gt. West. Ry. Co.*, 11 C. B. 140; *Gt. West. Ry. Co.* v. *Rimell*, 27 Law J. C. P. 204.

(*q*) *Bradley* v. *Waterhouse*, M. & M. 154.

(*r*) *McQueen* v. *Great Western Ry. Co.*, L. R. 10 Q. B. 569.

sufficient if some evidence is given which raises a *primâ facie* case that the goods were stolen by some or one of the carrier's servants (*s*).

All persons who are actually, though casually and incidentally, employed by the common carrier in doing the work of carrying, are the servants of the latter, although they may be the regular servants of some other persons, receiving wages from them and not from the carrier (*t*).

Liabilities of the common carrier's servants.—Sect. 8 of the statute provides, that the Act shall not protect the coachman, guard, bookkeeper, or other servant of the common carrier, from liability for losses or injuries occasioned by their own personal neglect and misconduct. This applies to liabilities *ex delicto*; for the coachman, guard, or other servant is not, by the common law, liable in any way *ex contractu* to the owner of the goods for loss or damage arising from his own personal negligence. The contract for the carriage of them is made with the common carrier or coach-proprietor who carries on the business, and not with a mere servant or agent who has no interest in the concern, and does not share in the profits of the trade. Thus, where an action was brought against a coach-porter for the value of a parcel lost by him, and also against the driver of a stage-coach for the loss of a trunk, it was held that, as the defendant in each case had received the article as the servant and agent of the coach-proprietor, and not on his own account, he could not be sued by the owner of the goods for the loss (*u*).

Losses occasioned by the negligence of the consignor—Defective packing.—If the loss has been occasioned by the negligence of the consignor or his servants, in not properly packing or securing the goods, the carrier is not responsible for the loss. If wine or spirits escape by reason of a defective bung in a cask, the carrier will not be answerable (*x*), unless it be shown that the carrier had notice of the leakage, and had the means of stopping it and neglected to do so, and that by reason thereof the plaintiff sustained the injury of which he complains (*y*). If the defective packing of goods is patent and visible, and easily remedied, and the common carrier accepts the goods for conveyance, he is bound to take all reasonable means to provide for their safety (*z*). But if the mode of packing is that in ordinary use, and the carrier is led by the sender's conduct to conclude that it is

(*s*) *Vaughton* v. *London & North Western Ry. Co.*, L. R. 9 Ex. 93.

(*t*) *Machu* v. *Lond. & South-West. Ry. Co.*, 2 Exch. 426.

(*u*) *Cavanagh* v. *Such*, 1 Pr. 331; *Williams* v. *Cranston*, 2 Stark. 82.

(*x*) *Hudson* v. *Baxendale*, 2 H. & N. 575.

(*y*) *Beck* v. *Evans*, 16 East, 244.

(*z*) *Stuart* v. *Crawley*, 2 Stark. 32

safe, the carrier, at any rate if he is not a common carrier, will not be responsible for injury to the goods arising from such packing (*a*).

A common carrier is liable as an ordinary bailee for negligence, and he is liable for a loss occasioned by negligence, even though the act of God or of the Queen's enemies conduces to the loss. He is also liable as an insurer for losses which occur through no negligence on his own part; but, like an insurer, he is not liable for accidents happening through the inherent vice of the thing carried (*b*). Thus, a common carrier is not liable for the loss of the goods carried arising from their inherent tendency to decay or ignite (*c*). Nor is he liable for injury to animals, the result of some vice which, by its own internal development, affects the animal without any default or negligence of the carrier (*d*).

Railway and Canal Act—Inability of railway, canal, and steam-boat companies to exonerate themselves from liability for their own neglect, default, or breach of duty by notice, condition, or declaration.—By s. 7 (*e*) of the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31,—which by 31 & 32 Vict. c. 119, s. 16, extends, so far as its provisions are applicable, "to steam vessels and to the traffic carried on thereby,"—every railway company and canal company is made liable for the loss of, or for any injury done to, any horses, cattle, or other animals, or to any articles, goods, or things in the receiving (*f*), forwarding, and delivering thereof, occasioned by the neglect or default of such company, or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration, being thereby declared to be null and void. But it is provided that nothing therein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable (*g*), and that they shall not be liable to a greater extent than certain sums named in the section for injuries to horses, cattle, &c., unless the sender has declared them to be of

(*a*) *Richardson* v. *North-Eastern Ry. Co.*, L. R. 7 C. P. 75; 41 L. J. C. P. 60.

(*b*) *Blower* v. *Great Western Ry. Co.*, *infra*.

(*c*) *Alston* v. *Herring*, 11 Exch. 822; *Bohl* v. *Parr*, 1 Esp. 444; *Boyd* v. *Dubois*, 3 Campb. 133.

(*d*) *Blower* v. *Gt. West. Ry. Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 268; *Kendall* v. *London & South Western Ry. Co.*, L. R. 7 Ex. 373; 41 L. J. Ex. 184.

(*e*) See *Baxendale* v. *Gt. Eastern Ry. Co.*, L. R. 4 Q. B. 254.

(*f*) As to when a horse is "received," see *Hodgman* v. *West Mid. Ry. Co.*, 35 L. J. Q. B. 85; 6 B. & S. 560.

(*g*) As to the construction of this section, see *Peek* v. *North Staff. Ry. Co.*, *post*, p. 556.

greater value at the time of delivery, and paid an increased charge accordingly.

Where an Act of Parliament authorized a railway company to make regulations respecting passengers' luggage, and the company, by their regulations, required the passengers to see their luggage marked with the company's labels, and stated that the company would not be responsible for the loss or detention of any article of luggage not so marked and properly addressed, and the plaintiff, who was a passenger, required the company's porter to label and take into the luggage-van some wearing apparel wrapped in a shawl and properly addressed, and the porter refused, as the company had made it a rule not to label shawls, it was held that the company was responsible for the porter's refusal to receive the shawl; and that the company could not make regulations having the effect of divesting them of their common-law liability to receive and carry the article as personal luggage (*h*).

In cases where railway companies under the Carrier's Act, or the Railway Traffic Act, are entitled to receive an increased rate of charge for insuring the safe conveyance of particular articles, and the consignor objects to the increased rate of charge, and it is agreed that the company shall receive and forward certain articles uninsured, this may be taken as doing away with their common-law liability as insurers of the safe conveyance of the articles, but does not exempt them from responsibility for losses by negligence through their own default (*k*), *e.g.*, for delay in not forwarding the articles (*l*).

If goods are accepted for conveyance under a special contract, whereby the carrier exempts himself from liability for loss or damage of a particular character, such as leakage or breakage, this will not exempt him from responsibility if the leakage or breakage has been caused by his own negligence, or the negligence of his servants in storing the goods (*m*). And the rule is the same, where the suit is brought in the Court of Admiralty against the vessel (*n*). It makes no difference that the contract was made with another person, if the plaintiff's goods were lawfully in the possession of the defendants, and were lost or injured through their negligence (*o*). Where the plaintiff's goods on board ship were injured by oil during the voyage, and it was shown that there was no oil amongst the cargo, but that there were two donkey engines

(*h*) *Munster* v. *South Eastern Ry. Co.*, 4 C. B. N. S. 676; 27 Law J. C. P. 312.

(*k*) *Peek* v. *North Staff. Ry. Co.*, 10 H. L. C. 473; 32 Law J. Q. B. 241.

(*l*) *Robinson* v. *Gt. Western Ry. Co.*, 35 L. J. C. P. 123.

(*m*) *Phillips* v. *Clark*, 26 Law J. C. P. 168; 2 C. B. N. S. 163; *M'Manus* v. *Lanc. and Yorkshire Ry. Co.*, *infra*.

(*n*) *Ohrloff* v. *Briscall*, L. R. 1 P. C. Ca. 231.

(*o*) *Martin* v. *Gt. Indian Peninsular Ry. Co.*, L. R. 3 Exch. 9.

on board in which oil was used, and which were near the plaintiff's goods, it was held that this raised a presumption of negligence against the owners of the vessel (*p*).

Special contracts with railway and canal companies for the carriage of goods and chattels.—By the Railway and Canal Traffic Regulation Act (17 & 18 Vict. c. 31), it is further enacted by the same section (s. 7), that no special contract between any railway or canal company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things, shall be binding upon or affect any such party unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively, for carriage; but nothing therein contained is to alter or affect the rights, privileges, or liabilities of any such company, under the 11 Geo. 4 & 1 Wm. 4, c. 68, with respect to articles of the description mentioned in that Act. Special contracts with railway and canal companies, therefore, for the carriage of merchandise and chattels, are placed under the control of the judges, so that the conditions imposed by the contract must be just and reasonable; and no condition, however just and reasonable, can protect the company, unless it be contained in a contract signed in accordance with the statute (*q*). But no special contract signed according to the statute is necessary to define the nature and extent of the public profession of the common carrier and of the duties he undertakes in favour of the public at large (*r*); and a contract not signed is valid as against the company (*s*).

Before the statute, every case in which a special limited liability was substituted for the general common-law obligation of the carrier, whether by notice acquiesced in, or document signed by the customer, was one of special contract, and the statute is to be construed with reference to that state of the law; so that every notice, condition and declaration, under the statute, however reasonable, must be made in writing, and be signed in the mode provided by the statute, in order to be binding in law upon the person sought to be affected by it (*t*). If a man has an opportunity of reading the conditions, and chooses to sign them without

(*p*) *Czech* v. *Gen. Steam Nav. Co.*, L. R. 3 C. P. 14.

(*q*) *Peek* v. *North Staff. Ry. Co.*, 10 H. L. C. 473; 32 L. J. Q. B. 241; *Aldridge* v. *Gt. West. Ry. Co.*, 15 C. B. N. S. 582; 33 L. J. Q. B. 161; *Allday* v. *Gt. West. Ry. Co.*, 34 L. J. Q. B. 5; 5 B. & S. 903; *Lond. & North West. Ry. Co.* v. *Dunham*, 18 C. B. 829; *McManus* v. *Lanc. & York. Ry. Co.*, 4 H. & N. 335; 28 L. J. Ex. 359.

(*r*) *Ante*, p. 525.

(*s*) *Baxendale* v. *Great Eastern Ry. Co.*, L. R. 4 Q. B. 244, 251; 38 L. J. Q. B. 137.

(*t*) *M'Manus* v. *Lanc. and York. Ry. Co.*, *supra*; *Peek* v. *North Staff. Ry. Co.*, *ut sup.*; *Simons* v. *Gt. West. Ry. Co.*, 18 C. B. 826; 26 Law J. C. P. 25; *Beal* v. *South Dev. Ry. Co.*, 5 H. & N. 886.

reading them, he is nevertheless bound by them, if they are reasonable (u). But the Act does not apply to traffic beyond the company's own lines or canals, so that a condition printed on a passenger's through ticket from London to Paris, that the company would not be responsible for loss, &c., except on the company's own lines, is valid, although not signed by the passenger (x).

What are unjust and unreasonable conditions in special contracts for the carriage of chattels by railway or canal.—The reasonableness or unreasonableness of the condition made by the company with respect to the receiving, forwarding, and delivering of goods and chattels, will materially depend upon the nature of the articles to be conveyed, the degree of risk attendant upon their conveyance, the rate of charge made, and whether the railway company was bound by the common law, or by statute, to carry the articles on being paid the customary hire, or whether it was in its power to reject them altogether and refuse to carry them upon any terms (y). Whenever, in order to bring a railway or canal company within the protection of a condition or special contract, it is necessary to construe it as excluding responsibility for losses occasioned by the company's negligence and misconduct, the condition or special contract is unreasonable and unjust, and therefore void, unless an option is given to the customer to have the goods carried on the ordinary terms, at the ordinary rate (z). Where the terms of the condition are unconditional, and would, if valid, protect the company even in the case of the wilful misconduct of the defendant's own servants, the condition is unreasonable (a). The plaintiff sent a cow and a heifer by the defendants' railway, and signed a cattle ticket, on the back of which were conditions that the company were to be free from all risk with respect to any loss or damage arising in the loading, transit, &c., or from any other cause whatever, and the owner was required to see to the efficacy of the waggons, and make complaint in writing before the waggon left the station. The cow fell out of the truck. It was held that the whole of these conditions were unreasonable, as they showed a determination not to be held liable for any loss whatever; but conditions may

(u) *Lewis* v. *Gt. West. Ry. Co.*, 5 H. & N. 874; 29 Law J. Exch. 425.

(x) *Zunz* v. *South East Ry.*, L. R. 4 Q. B. 539.

(y) *Pardington* v. *South Wales Ry. Co.*, 1 H. & N. 396; *Simons* v. *Gt. West. Ry. Co.*, 18 C. B. 805; *Garton* v. *Brist. and Ex. Ry. Co.*, El. B. & El. 112; 30 Law J. Q. B. 273; as to what is a reasonable per-centage charge on declared value, see *Harrison* v. *Lond., Brighton, & S. C. Ry. Co.*, 31 Law J. Q. B. 113.

(z) *Peck* v. *North Staff. Ry. Co.*, *supra*: *Lloyd* v. *Waterford & Lim. Ry. Co.*, 15 Ir. Com. Law Rep. Q. B. 37; *Allday* v. *Gt. Western Ry. Co.*, *supra*; *Rooth* v. *The North Eastern Ry. Co.*, L. R. 2 Ex. 173; 36 L. J. Ex. 83.

(a) *Ashendon* v. *L. B. & S. C. Ry.*, 5 Ex. D. 190, where *Harrison* v. *L. B. & S. C. Ry.* is said to be overruled by *Peck* v. *N. S. Ry.*, *supra*.

some of them be reasonable and some not; and the plaintiff will be bound by those which are reasonable (*b*). And, where a railway company received goods to be carried under a condition absolving them from all liability for the loss of, or damage to, goods insufficiently or improperly packed, marked, directed, or described, the condition was held to be unreasonable and unjust, as insufficient packing, marking, or directing, &c., of goods constituted no sufficient ground for relieving the company from all liability respecting the performance of the duty they had undertaken to fulfil (*c*).

Every stipulation or condition professing to exempt a railway company or canal company from liability for its own negligence or misconduct, or that of its servants and agents, is unjust and unreasonable. "It is impossible," justly observes Lord Ellenborough, "without outraging common sense, to allow carriers to say, 'We will receive your goods, but we will not be bound to take any care of them, and will not be answerable at all for any loss occasioned by our own misconduct, be it ever so gross and injurious'" (*d*).

Where horses were delivered to be forwarded by a cattle-truck from Liverpool to York for reward, and the owner was required to sign a ticket containing a memorandum to the effect that the ticket was issued subject to the owner's undertaking all risk of conveyance, loading and unloading, as the company would not be responsible for any injury or damage, however caused, occurring to live stock travelling upon the railway, or in their vehicles, and the defendant's servants provided a truck which, in external appearance, and, so far as the defendant's servants knew, was sound, and sufficient for the conveyance of the horses, but it was, in fact, unsound, and of insufficient strength for the purpose, and a hole was made in the bottom of the truck during the journey, and one of the horses got his leg through the hole and was injured, it was held that the railway company was responsible for the damage done to the horse, notwithstanding the terms of the special contract signed by the owner of the horse. "We are of opinion," observes the Court, "that the condition or special contract in this case is not just and reasonable. In order to bring the defendants within its protection, it is necessary to construe it as excluding responsibility for loss occasioned, not only by all risks of whatever kind directly incidental to the transit, but also for that

(*b*) *Gregory* v. *West Mid. Ry. Co.*, 2 H. & C. 951; 33 L. J. Ex. 155; *McCance* v. *L. & N. W. Ry. Co.*, 31 L. J. Ex. 65; *Simons* v. *Gt. West. Ry. Co.*, *ante*, p. 555; see, however, per Martin B., *Kirby* v. *G. W. Ry. Co.*, 18 L. T. 658.

(*c*) *Simons* v. *Gt. West. Ry. Co.*, *ante*, p. 555; *Lond. & North-West. Ry. Co.* v. *Dunham*, *supra*; *Garton* v. *The Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273.

(*d*) *Lyon* v. *Mells*, 5 East, 438; Ld. Wensleydale in *Peek* v. *North Staff. Ry. Co.*, 32 Law J. Q. B. 274; *Allday* v. *Gt. West. Ry. Co.*, 5 B. & S. 903; 34 L. J. Q. B. 5; and see *ante*, pp. 535, 553.

caused by the insufficiency of the carriages provided by the defendants, though occasioned by their own negligence or misconduct. The sufficiency or insufficiency of the vehicles by which the companies are to carry is a matter, generally speaking, which they, and they alone, have the means of fully ascertaining; and it would be unreasonable and mischievous if they were to be allowed to absolve themselves from the consequence of neglecting to perform properly that which seems naturally to belong to them as a duty. It is unreasonable that the company should stipulate for exemption from liability for the consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition under consideration professes to do. That condition is therefore void, and the case stands simply upon the ground that the plaintiff has employed the defendants to carry his horses safely, and that they have used an insufficient and improper vehicle for that purpose, whereby the horses have been injured" (*e*). A stipulation that goods shall be carried "at owner's risk" only exempts the company from the ordinary risks incurred by goods in going along the railway, and does not cover injury from delay caused by the negligence of the company (*f*).

The court is bound to look at the particular matter in each case to see whether the condition is reasonable or not; and it has been held that a condition which seeks to relieve a railway company from the consequences of the loss or non-delivery of goods, by reason of insufficient or improper package, is not reasonable (*g*); and if the condition is framed without limitation or exception, so as to exempt the company from all responsibility for injury, however caused, it will be void, as being neither just nor reasonable (*h*).

It is the duty of every railway or canal company setting up a condition in qualification and restriction of their common law liability to make out that the condition is just and reasonable; and, if they make an extra charge for insuring the safe conveyance of live animals, they must show that the extra charge is reasonable and just (*i*).

It was held that where there was a contract that goods were to be carried " at owner's risk," the railway company were responsible

(*e*) *M'Manus* v. *Lanc. and Yorkshire Ry. Co*, 4 H. & N. 327; 28 Law J. Exch. 353; *M'Cance* v. *Lond. & North-West. Ry. Co.*, 7 H. & N. 477; 31 Law J. Exch. 65.

(*f*) *Robinson* v. *Great Western Ry. Co.*, 35 L. J. C. P 123; *D'Arc* v. *London & North Western Ry. Co.*, L. R. 9 C. P. 325.

(*g*) *Simons* v. *Gt. West. Ry. Co.*, 18 C. B. 830; 26 Law J. C. P. 25; Ld. Wensleydale, *Peek* v. *North Staff. Ry. Co., supra.*

(*h*) *Peek* v. *North Staff. Ry. Co., ante*, p. 556; *Gregory* v. *West Mid. Ry. Co.*, 33 Law J. Exch. 155.

(*i*) *Harrison* v. *Lond. Br. & S. C. Ry. Co.*, *Garton* v. *Brist. & Ex. Ry. Co.*, *Peck* v. *North Staff. &c., ante*, p. 556.

for delay in delivery, although a lower charge than usual was made (*k*). But where there was a similar contract, but the company were to be liable for the wilful misconduct of their servants, the company were held not responsible, there being no wilful misconduct, and that the contract was reasonable (*l*). Where the company were not to be liable in respect of any loss or "detention," except by wilful misconduct, it was held that a purposed detention through a negligent mistake in supposing the carriage had not been paid, although not amounting to wilful misconduct, was a "detention" for which the company was liable (*m*).

What are just and reasonable conditions.—It has been held that a condition that all claims for loss or damage should be made within seven days after the time when the goods have been delivered is just and reasonable (*n*), also a condition that a railway company will not undertake to forward goods by any particular train, or be answerable for their non-arrival in time for any particular market (*o*), and that they will not be responsible, under any circumstances, for loss of market or other loss or injury arising from detention of trains, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud (*p*), or that they will not be responsible for the risks attendant upon the carriage by railway of perishable articles, live animals and chattels, such as accidents occasioned by the fright or restiveness of horses, or from the wheel of a carriage taking fire (*q*), or loss arising from delay in forwarding fish, where it is impossible to know the exact condition of the fish at the time of its delivery to be carried, and where the slightest delay in its transmission may occasion a vast loss (*r*), or to loss or damage to fragile materials, such as statuary or sculptured marbles, not occasioned by the negligence of the company or its servants (*s*). If the company offer the consignor a *bonâ fide* practical choice, either to have his goods carried in the usual way, at a reasonable rate, or at his own risk at a lower rate, and he elects the latter, the condition is not unreasonable (*t*). A condition annexed to a contract for the carriage of meat that the

(*k*) *D'Arc* v. *L. & N. W. Ry. Co.*, 9 C. P. 325, *ante*.

(*l*) *Lewis* v. *G. W. Ry.* 3 Q. B. D. 195; see *Gordon* v. *Gt. Western Ry.* 8 Q. B. D. 44.

(*m*) *Gordon* v. *G. W. Ry. Co.*, 8 Q. B. 44. If the defendants intended to say that they were not to be liable for such "detention" then the condition was unreasonable.

(*n*) *Lewis* v. *Gt. West. Ry. Co.*, 29 L. J. Ex. 425; 5 H. & N. 867.

(*o*) *Beal* v. *South Dev. Ry. Co.*, 5 H. & N. 875; 29 L. J. Ex. 441; *White* v. *Gt. West. Ry. Co.*, 2 C. B. N. S. 7; 26 L. J. C. P. 158; *Lord* v. *The Midland Ry. Co.*, L. R. 2 C. P. 339; 36 L. J. C. P. 170.

(*p*) *Beal* v. *South Dev. Ry. Co.*, 3 H. & C. 337.

(*q*) *Austin* v. *Manchester Ry. Co.*, 10 C. B. 475.

(*r*) *Beal* v. *South Devon Ry. Co.*, *supra*; *Wren* v. *East. C. Ry. Co.*, 35 Law T. R. Q. B. 5.

(*s*) *Peck* v. *North Staff. Ry. Co.*, *ante*, p. 556.

(*t*) Blackburn, J., *ib.*; *Lewis* v. *G. W. Ry. Co.*, *supra*; *Brown* v. *M. S. & L. Ry. Co.*, 8 Q. B. D. 230.

company will not be responsible for loss of a market, is reasonable (*u*).

The 17 & 18 Vict. c. 31, s. 7, is extended by the 26 & 27 Vict. c. 92, and 31 and 32 Vict. c. 119, s. 16, to steam-vessels employed by railway companies, as auxiliary to their line of railway, and to the traffic carried on by means of such steam-vessels. It applies to passengers' luggage (*w*), but not to goods received by the company for safe custody, and not for carriage (*x*). Nor does it apply to a contract exempting a company from liability for loss on a railway not belonging to or worked by the company (*y*). The 34 & 35 Vict. c. 78, s. 12, applies where the carriage is by a vessel not belonging to nor worked by the company (*z*).

Liability of a railway company during sea transit.—When a railway or canal company contracts by through booking to carry any animals, luggage, or goods from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage by sea of such animals, luggage, or goods from the act of God, the king's enemies, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, will, if published in a conspicuous manner in the office when such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, luggage, or goods, be valid, as part of the contract between the consignor of such animals, luggage, or goods, and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition (*a*).

Where a railway company, under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the company, they will be answerable in damages in respect of loss of life or personal injury, or in respect of loss or damage to such animals or goods during the carriage in such vessel, in like manner, and to the same amount, as they would be answerable if the vessel had belonged to them (*b*).

Of the implied authority of the servants of a railway company to bind the company by special contract.—"It is the duty of railway companies to have some person capable of giving directions and of dealing with everything that the exigency of the traffic may

(*u*) *Lord* v. *Midland Ry. Co.*, L. R. 2 C. P. 339.

(*w*) *Cohen* v. *S. E. Ry.* 2 Ex. D. 253.

(*x*) *Van Toll* v. *South-Eastern Ry. Co.*, 12 C. B. N. S. 75; 31 L. J. C. P. 241.

(*y*) *Zunz* v. *South Eastern Ry. Co.*, L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.

(*z*) *Doolan* v. *Mid. Ry.* 2 Ap. Cas. 792.

(*a*) 31 & 32 Vict. c. 119, s. 14, *post*, p. 565.

(*b*) 34 & 35 Vict. c. 78, s. 12, *post*, p. 565

require, and of granting any reasonable demand. The persons who are said to be general superintendent and managing director have power to bind the company as to all things within the scope of the business of the company by any contract within the limits of their employment" (c). If they act beyond the scope of their ordinary business, it must be shown, in order to bind the company, that they are acting under a special authority from the company, that is, the board of directors (d). But, if there is a particular course of dealing with which the consignor is acquainted, he must be taken to know that the servants have no power to bind the company on any but the usual terms (e).

Commencement and duration of the liability—Damage or loss of goods in warehouses.—When the common carrier of goods carries on the business both of a warehouseman and a common carrier, the nature and extent of his liability will depend upon the character in which he holds the goods at the time of the loss. If they are received into his warehouse to await the future orders of the owner or consignor as to their destination, he is clothed only with the ordinary duties and responsibilities of a warehouseman or bailee for hire (f). Goods received at the cloak-room of a railway company, therefore, are not received by the company in their capacity of common carriers, but simply as bailees for hire (g). But if the destination is marked out, and the carrier has nothing to do but to forward the goods on the earliest opportunity to the place indicated, he is responsible as a common carrier for any loss or damage that may occur to the goods in the warehouse, as they are then *in transitu* in contemplation of law (h). Whenever the common carrier receives goods to be kept until called for, or until he has orders from the consignee to forward them, he holds them as a bailee for hire and not as a gratuitous bailee, although he does not charge warehouse rent (i).

Delivery of goods at the place of destination.—The common carrier of goods is bound, in common with all carriers for hire, to carry the goods intrusted to him for conveyance to their place of destination with reasonable expedition (k), and deliver them into the hands of the consignee, or of some person ex-

(c) *Brown* v. *Brist. & Ex. Ry. Co.*, 4 Law T. R. N. S. Ex. 830; *Robinson* v. *The Great West. Ry. Co.*, 35 L. J. C. P. 123.

(d) *Taff Vale Ry. Co.* v. *Giles*, 23 L. J. Q. B. 43.

(e) *Slim* v. *Great Northern Ry. Co.*, 23 L. J. C. P. 168.

(f) *Cairns* v. *Robins*, 8 M. & W. 263; *Garside* v. *Trent Navigation Co.*, 4 T. R. 582.

(g) *Van Toll* v. *South-East. Ry. Co.*, 31 Law J. C. P.

(h) *Forward* v. *Pittard*, 1 T. R. 27; Buller, J., in *Hyde* v. *Trent & Mersey Nav. Co.*, 5 T. R. 398; see *Ex parte Barrow*, 6 Ch. D. 783. As to accidental fires in warehouses, see Add. on Torts, 5th ed. by Cave, p 339, *et seq.*

(i) *White* v. *Humphery*, 11 Q. B. 43.

(k) *Raphael* v. *Pickford*, 6 Sc. N. R. 478; 2 Dowl. N. S. 916; *Black* v. *Baxendale*, 1 Exch. 410; 17 Law J. Exch. 50.

pressly or impliedly authorized by him to receive them; and he must, of course, in all cases, take especial care that they are delivered into the hands of the right person (*l*). If, however, carriers are imposed upon by a fictitious order, they will not be responsible, if they act according to the usual custom of business, and in accordance with their instructions (*m*). When the carriage is by land, the goods must be sent to the residence of the consignee, for the common carrier is not released from responsibility by leaving them at the coach-office, or at an inn by the road-side at which the coach usually stops, unless he has received directions from the consignee so to do (*n*). If he tenders them at the residence of the consignee, and is ready to deliver them on receiving payment of his hire, he has fulfilled his contract as a carrier; and if the hire is not paid he is not bound, as we have already seen, to part with the possession of the goods: but he may lawfully take them back to his own warehouse, or place of business; and he holds them thenceforward not as a common carrier, but as a bailee for hire, or (if he is not entitled to charge, or does not charge, warehouse rent) as a gratuitous bailee (*o*), and is only liable, therefore, to act with reasonable care and caution with respect to the goods (*p*). And if the consignee, having no warehouse of his own, asks him to keep the goods till he can conveniently send for them, the common carrier thenceforth holds the goods only as a warehouseman for hire, or a gratuitous bailee, according as he may or may not be paid for his care and custody of them (*q*). Upon the arrival of the goods at their destination, and tender of them to the consignee, the carrier is no longer a common carrier in the sense of being an insurer, but is bound nevertheless to take care of the goods (*r*); and if he is put to expense in so doing by reason of the default of the consignee in not receiving the goods, the carrier may recover such expenses (*s*). Where goods are delivered to be carried to a certain place for a named consignee, such consignee is entitled to delivery at any other place, and the carrier is not responsible for loss after such delivery (*t*). The carrier is protected by the Carrier's Act after the goods have been negligently

(*l*) *Golden* v. *Manning*, 3 Wils. 433; 2 W. Bl. 916; *Birket* v. *Willan*, 2 B. & Ald. 356; *Duff* v. *Budd*, 6 Moore, 469; *Stephenson* v. *Hart*, 1 M. & P. 357; 4 Bing. 476.

(*m*) If they are imposed upon by a fictitious order, see *McKean* v. *McIvor*, L. R. 6 Exch. 36.

(*n*) *Lond. & North-West. Ry. Co.* v. *Bartlett*, 7 H. & N. 400; 31 Law J. Exch. 92.

(*o*) *Storr* v. *Crowley*, M'Clel. & Y. 136.

(*p*) *Heugh* v. *Lond. & North-West. Ry.*, L. R. 5 Exch. 51.

(*q*) *In re Webb*, 8 Taunt. 449; 6 Moore, 500; see *Shepherd* v. *Bristol & Exeter Ry. Co.*, L. R. 3 Exch. 189.

(*r*) See the cases cited in Smith on Negligence, p. 104; and see *Gt. N. Ry. Co.* v. *Swaffield*, L. R. 9 Ex. 132; *Chapman* v. *G. W. Ry.* 5 Q. B. D. 278; *Ex parte Cooper*, 11 Ch. D. 68.

(*s*) *Gt. N. Ry. Co.* v. *Swaffield*, *supra*.

(*t*) *Cork Distillers Co.* v. *Great Southern Ry. Co. Ireland*, L. R. 7 H. L. 269.

carried beyond the destination (*u*). When the carriage is by water, the delivery at a wharf is not a delivery to the consignee, unless it is made so by the usage and practice of the port where the delivery takes place; but the master is bound to give the consignee notice of the arrival of the goods, and is not released from his responsibility for their safety until a reasonable time has elapsed after the giving of the notice for the consignee to come and fetch them. He cannot escape from his liability as a common carrier by immediately landing the goods at a public wharf, without giving notice to the consignee, and giving him an opportunity of receiving them from the ship's side; and if he does so land them, and they are destroyed upon the wharf by an accidental fire before the consignee has had an opportunity of taking them away, the shipowners will be responsible for the loss (*x*).

Delivery of luggage at railway stations.—In the case of the carriage of passengers with luggage by railway, if it is the usual course for the luggage to be taken from the train by the company's servants and delivered to the passengers on the platform, the company is bound to deliver it there. And if the company choose to provide a more convenient mode of delivering luggage to passengers by employing porters to carry it across the platform to the vehicles by which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty (*y*). The passenger must be allowed a reasonable time to claim his luggage at the destination (*z*). Passenger's luggage is within s. 7 of the Railways and Canals Traffic Act, and a notice or condition that the company will not be responsible is void (*a*).

Acceptance of goods and passengers to be carried beyond the limits of the ordinary destination.—When a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance (*b*), that is *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade of a carrier. His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsi-

(*u*) *Merrit* v. *N. E. Ry. Co.*, 1 Q. B. D. 302.

(*x*) *Bourne* v. *Gatliffe*, 3 Sc. N. R. 1; 8 *ib.* 604; 7 M. & Gr. 850; *Syeds* v. *Hay*, 4 T. R. 260; *Wardell* v. *Mourillyan*, 2 Esp. 693.

(*y*) *Richards* v. *Lond. & Brighton, &c., Ry. Co.*, 7 C. B. 839; 18 Law J. C. P. 251; *Butcher* v. *Lond. & South-Western Ry. Co.*, 16 C. B. 13. See *ante*, p. 544.

(*z*) *Patscheider* v. *G. W. Ry.* 3 Ex. D. 153.

(*a*) *Cohen* v. *S. E. Ry.* 2 Ex. D. 253.

(*b*) That such a limitation is a reasonable one, see *Aldridge* v. *Gt. Western Ry. Co.*, 33 Law J. C. P. 161.

bility by transferring the goods to another carrier, or sending them by another conveyance (*c*). If a railway company, for example, accepts goods for conveyance to a particular destination, beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another railway company, to whom they have been delivered to be forwarded on their journey, the first railway company is the party to be sued by the owner of the goods for the loss of them (*d*), unless the company has by express contract limited its liability to loss and damage occurring on its own line of railway (*e*). But a proviso in the contract exonerating the company from all liability in respect of loss of, or damage to, the goods occurring beyond the limits of its own line of railway, from the negligence of other companies to whom the goods have been delivered to be forwarded, is repugnant and void (*f*).

In the absence of special circumstances, the responsibility of a railway company in and about the conveyance of goods accepted by them for delivery at a particular destination is the same, whether their own line extends the whole distance or stops at an intermediate point, and the railway companies carrying the goods beyond the limits of the first line of railway are, in respect of the conveyance and delivery of such goods, to be regarded as the agents of the railway company which originally received the goods (*g*). The same principle applies to the conveyance of passengers (*h*), who are injured during the journey, although the negligence be that of the company over whose line the defendant company have running powers, and not of the defendants themselves (*i*). And it applies to the commencement of the journey as well as its termination. Where, therefore, the contract was to carry the plaintiff from the shore to a hulk, and there wait till a vessel came to carry him to his destination, and he was injured while on board the hulk, it was held that the defendants were responsible, though the hulk did not belong to them, and they had only acquired by agreement the right to use it for the purpose of embarking passengers on board their vessels (*k*).

(*c*) *Garnett* v *Willan*, 5 B. & Ald. 53.

(*d*) *Muschamp* v. *Lanc. & Preston Ry. Co.*, 8 M. & W. 421; *Watson* v. *Ambergate Ry. Co.*, 15 Jur. 448; *Collins* v. *Bristol & Exeter Ry. Co.*, 11 Exch. 790; 25 Law J. Exch. 185; *Brist. & Exeter Ry. Co.*, v. *Collins*, 7 H. L. C. 234; *Wilby* v. *West. Corn. Ry. Co.*, 2 H. & N. 709; *Mytton* v. *Midland Ry. Co.*, 4 H. & N. 615; *Coxen* v. *Gt. Western Ry. Co.*, 5 H. & N. 274; 29 Law J. Exch. 165; *Hayes* v. *South-Western Ry. Co.*, 9 Ir. C. L. R. 474; *Webber* v. *Great Western Ry. Co.*; 34 Law J. Exch. 170.

(*e*) *Fowles* v. *Gt. Western Ry. Co.*, 7 Exch. 699; 22 Law J. Exch. 76; *Aldridge* v. *Gt. Western Ry. Co.*, *supra*; see *Zunz* v. *South-East. Ry.*, *ante*, p. 556.

(*f*) *Brist. & Ex. Ry. Co.* v. *Collins*, 7 H. L. C. 321.

(*g*) *Crouch* v. *Gt. Western Ry. Co.*, 26 Law J. Exch. 345; *Scothorn* v. *South Staff. Ry. Co.* 8 Ex. 345.

(*h*) *Blake* v. *Gt. Western Ry. Co.*, 7 H. & N. 987; 31 Law J. Exch. 346; *Buxton* v. *North-Eastern Ry. Co.*, L. R. 3 Q. B. 549.

(*i*) *Thomas* v. *Rhymney Ry. Co.*, L. R. 5 Q. B. 226; 6 *ib.* 266. See *Foulkes* v. *Met. Ry. Co.*, L. R. 4 C. P. D. 267; 5 C. P. D. 157.

(*k*) *John* v. *Bacon*, L. R. 5 C. P. 437.

Railway companies may also enter into such arrangements with one another as to become agents for one another, and responsible for each other's acts, so that a contract to carry and deliver cattle made with one company may render the other liable for a breach occurring on the line of the latter (*l*). If one railway company receives goods to carry part of the way, and then transfers them to another company to carry them to the place of destination, the agents of the latter company are agents of the first company for receiving notice of countermand; and, if they receive such notice and pay no attention to it, the first company is responsible for the neglect (*m*). The consignor may receive the goods at any stage of the journey, and may alter their destination at his pleasure (*n*).

By the 31 & 32 Vict. c. 119, it is provided (s. 14), that where a railway or canal company, or the lessees, owners, or managers of such company, by through booking, contract to carry any animals, luggage, or goods partly by railway and partly by sea or canal, a condition exempting the company from liability for any loss or damage arising during the carriage by sea from the act of God, the king's enemies, fire, accidents from machinery, boilers, or steam, and all other accidents of seas, rivers, and navigation of whatever kind, shall, if published in a conspicuous manner in the office where the through booking is effected, and legibly printed on the receipt or freight note, be valid as part of the contract between the consignor and the company.

By the 34 & 35 Vict. c. 78, it is provided (s. 12), that where a railway company under a contract for carrying persons, animals, or goods by sea, procure the same to be carried in a vessel not belonging to the railway company, the railway company shall be answerable in damages, in respect of loss of life, or personal injury, or in respect of loss of or damage to animals or goods, in like manner and to the same amount as the railway company would be answerable if the vessel had belonged to the railway company, provided that such loss of life, or personal injury, or loss, or damage to animals or goods, happens to the person, animals, or goods (as the case may be), during the carriage of the same in such vessel, the proof to the contrary to lie upon the railway company.

Effect of giving the carrier a wrong direction for the delivery of the goods.—If, after the carrier has fulfilled his part of the con-

(*l*) *Gill* v. *Manchester, &c. Ry. Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89.

(*m*) *Scothorn* v. *South Staff. Ry. Co.*, 8 Exch. 345; *Crouch* v. *Gt. West. Ry. Co.*, 27 L. J. Ex. 345; 3 H. & N. 201.

(*n*) *London & N. W. Ry. Co.* v. *Bartlett*, 7 H. & N. 400; 31 L. J. Ex. 92; *Butterworth* v. *Brownlow*, 19 C. B. N. S. 409; 34 J. C. P. 266.

tract by conveying the goods to the place to which they are directed, it should appear that there is no such person as the one to whom the goods are addressed, or if the consignee refuses them, then an entirely new contract arises by implication of law between the carrier and the consignor; the carrier holds the goods as the bailee of the consignor, and is bound to take due and ordinary care of them and to deliver them to the consignor, on being paid his fair and reasonable charges (*o*), but he is not liable for a subsequent mis-delivery of the goods if he acts with reasonable care (*p*).

Refusal of consignee to receive the goods—Liability of the carrier as bailee.—If the consignee refuses to receive the goods, or cannot be found, the carrier is not thereby exonerated from the duty of taking reasonable care of them, and doing what is reasonable in the matter for the benefit of the consignor, or the owner of them. If the person to whom they are addressed is not ready to receive them at the place of delivery, the carrier must keep them a reasonable time, if he has a convenient place of deposit there, and if he has no place of deposit he must deal with them as any reasonably prudent person might be expected to deal with his own property. If the consignor or owner of the goods is known to him, it would be reasonable to expect that he would give him notice of the refusal of the consignee to receive them, and seek instructions for the disposal of the property. If the consignor or owner is unknown to him, no such notice can, of course, be given, or be reasonably expected (*q*); but he should deposit the goods in some place of safety, and ought not at once to send back the goods to the place from whence they came (*r*).

Payment of the fare or hire—Carrier's lien.—When credit has not, by the express contract of the parties, been given for the payment of the price of the carriage of goods, the delivery of the goods to the consignee and the payment of the price of the carriage of them are concurrent acts to be performed at the same time, so that the carrier is entitled to retain possession of the things he has carried until he receives or is tendered his hire for their conveyance. If the consignee refuses to pay the sum demanded for the carriage of them, the carrier is not justified in at once sending them back to the place from whence they came, but must hold

(*o*) *Metcalfe* v. *Lond. & Br. Ry. Co.*, 4 C. B. N. S. 318; 38 L. J. C. P. 335; *Heugh* v. *Lond. & North-West. Ry. Co.*, L. R. 5 Ex. 51; 39 L. J. Ex. 48; *McKean* v. *M'Ivor*, L. R. 6 Ex. 36; 40 L. J. Ex. 30.

(*p*) *Heugh* v. *London and North-Western Ry. Co.*, L. R. 5 Ex. 51; 39 L. J. Ex. 4, 8.

(*q*) *Hudson* v. *Baxendale*, 27 Law J. Exch. 93.

(*r*) *Gt. Western Ry. Co.* v. *Crouch*, 3 H. & N. 169; 27 Law J. Exch. 345; *Heugh* v. *L. and N. W. Ry.* L. R. 5 Ex. 51; 39 L. J. Ex. 48.

them a reasonable time, to see if the consignee will accept and pay for them (*s*). If he still refuses, the carrier then holds them at the disposal and for the benefit of the consignor, and is entitled to look to the latter for the payment of his hire. The carrier holds the goods first that he may get payment of the freight, and then to deal with them as the consignee may direct (*t*). The transit is not at an end so long as the carrier holds the goods as carrier, nor until by agreement between him and the purchaser he holds them not as carrier, but as the purchaser's agent (*u*). Where a carrier delivers part of the goods, it may be assumed that he has not abandoned his lien upon the rest for his unpaid freight. He is bound to deliver up to the extent of the freight which has been paid; but the moment he has delivered enough to satisfy that, he has his lien upon the whole of the remainder of the cargo for the unpaid balance of the freight (*x*). If a railway company makes and posts at the offices and stations a bye-law to the effect that every passenger who loses his ticket shall be liable to pay the full fare from the most distant station on the line, the company has no power to enforce the bye-law by detaining the person of a passenger who has lost his ticket and refuses to pay the specified amount (*y*).

The common law accords to common carriers, who are bound, as we have seen, to receive and carry the goods of persons who tender them for conveyance, and are ready and willing to pay the customary hire, a right to retain the goods and chattels of such persons until they have received the customary remuneration for the services they have been compelled to render them, whether the goods are the property of the persons who have tendered them for conveyance, or the property of third parties from whom they have been fraudulently taken or stolen. Thus, where goods were stolen and delivered to a carrier to be carried to Exeter, and the owner finding them in the possession of the carrier demanded them of him, and the carrier refused to deliver them without being paid the price of their carriage, it was held that he was justified in so doing, "for when the robber brought them to him he was obliged to receive them and carry them, and therefore since the law compelled him to carry them, it will give him remedy by retainer for the price of the carriage" (*z*).

But the carrier has no right of lien by the common law for

(*s*) *Gt. West. Ry. Co.* v. *Crouch*, 3 H. & N. 201; S. C. *Crouch* v. *Gt. West. Ry. Co.*, 27 L. J. Ex. 345.

(*t*) *Ex parte Barrow*, 6 Ch. D. 783.

(*u*) *Ex parte Cooper*, 11 Ch. D. 68.

(*x*) *Ex parte Cooper, supra.*

(*y*) *Chilton* v. *Lond. and Croyd. Ry. Co.*, 16 M. & W. 212; 16 L. J. Ex. 89; *Poulton* v. *L. & N. W. Ry. Co.*, L. R. 2 Q. B. 534. See Add. on Torts, 5th ed. by Cave, p. 139.

(*z*) *Exeter Carriers Case*, cited 2 Ld. Raym. 867.

anything beyond the price of the carriage of the goods conveyed. He cannot detain them until he has received payment of a general balance due to him from the owners of such goods. Common carriers have oftentimes attempted to obtain a lien of this description, and to secure the payment of debts due to them for the previous conveyance of goods, by giving notices to the effect that all goods delivered to them for conveyance will be held as a security for the payment of such debts, as well as for the payment of the price of their own carriage (*a*). But the common carrier has no right to make any such bargain or stipulation. He is bound, as we have already seen, so long as he has room in his cart or carriage, to convey the goods of all persons on being tendered his hire for the carriage of the particular goods sought to be conveyed; and if he does obtain a promise from the consignor to the effect that he shall, if he carries the goods, have a right to retain them in his hands as a security for the payment of an antecedent debt, such promise is a mere *nudum pactum*, of no force or effect in the eye of the law (*b*). Where an Order in Council under an Act of Parliament (*c*) directed, that every cattle-truck should be disinfected once in every twenty-four hours during its use, it was held that the railway company had no lien for the expense of such cleansing upon the person sending cattle by the truck, as it was not a service done for such person individually as distinguished from the rest of the public (*d*).

The 97th section of the 8 Vict. c. 20, gives no lien upon goods for tolls or charges due to a railway company for other goods previously conveyed by them as carriers, but only for tolls previously due for the use of the line by persons conveying goods in their own carriages (*e*).

If a person goes to a coach-office and orders a place to be booked for him by a particular coach, and that be done, and he then leaves his portmanteau at the coach-office, the coach-proprietor will, it seems, have a lien upon the portmanteau for his reasonable and customary remuneration and charge for booking; but if the person merely leaves his portmanteau, and no place is booked, the coach-proprietor has no lien upon the portmanteau at all (*f*). When goods delivered to be carried are received from the waggon of the common carrier by the consignee, and are merely carried

(*a*) *Wright* v. *Snell*, 5 B. & Ald. 353.

(*b*) *Butler* v. *Woolcott*, 2 B. & P. N. R. 64; *Oppenheim* v. *Russell*, 3 B. & P. 47; *Rushforth* v. *Hadfield*, 6 East, 527; 7 *ib.* 227.

(*c*) 11 & 12 Vict. c. 107. This Act is repealed by the 32 & 33 Vict. c. 70, and see now 41 & 42 Vict. c. 74, *ante*, p. 527.

(*d*) *Cox* v. *Gt. Eastern Ry. Co.*, L. R. 4 C. P. 181.

(*e*) *Wallis* v. *L. and S. W. Ry.*, L. R. 5 Exch. 62.

(*f*) *Higgins* v. *Bretherton*, 5 C. & P. 2. Whether, if the place be booked, the coach proprietor would also have a lien for the full amount of the fare, *quære*, S. C.

into the warehouse to be weighed, the carrier has no right to charge for warehouse-room; and if the goods are taken up on the road, and have never been booked, he has no right to charge for the booking of them; and if, after tender of the price of the carriage, he detains them for these small charges, the detention is unlawful, and an action may be brought against him in respect thereof (*g*). A common carrier of passengers and luggage has a right of lien upon the luggage for the payment of the fare of the passenger as well as for the carriage of his effects, but he has of course no right to detain the person of the passenger or the clothes he is actually wearing (*h*). And if the carrier once parts with the possession of the goods he loses his lien, as in other cases. But if he loses the possession by fraud, the lien revives if possession is recovered (*i*).

Common carrier's charges—Railway charges—Bye-laws.—The statutes requiring justices of the peace to assess and fix the price of all land carriage of goods have long since been repealed (*k*); but the hire or charge for the carriage must be fair and reasonable, and must not exceed the ordinary and customary rate of remuneration. If a person sends to a carrier's office to know his rate of charge, the carrier is bound by the representation there made by his clerks; and, if goods are sent upon the faith of such representation, the carrier cannot charge more than the sum named, although the clerk may have inadvertently fallen into a mistake (*l*). When, by a railway Act, it is enacted that the word "toll" shall include the charge for goods conveyed by the railway, whether for the use of the railway or for the moving power, or for the use of the carriage, *primâ facie* it includes everything that a carrier does, and for which he is entitled to charge (*m*). By the Acts of parliament under which railway companies are incorporated, it is generally provided that the charges for the carriage of goods shall be reasonable and equal to all persons.

Duty of railway and canal companies to afford reasonable facilities for the carriage of passengers, merchandise, and chattels.—By the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), it is enacted (s. 2), that every railway company and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving, forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of

(*g*) *Lambert* v. *Robinson*, 1 Esp. 119.
(*h*) *Wolf* v. *Summers*, 2 Campb. 631.
(*i*) *Wallace* v. *Woodgate*, Ry. & M. 194
(*k*) 7 & 8 Geo. 4, c. 39 (repealed).
(*l*) *Winkfield* v. *Packington*, 2 C. & P. 600.
(*m*) *Pegler* v. *Monm. Ry. & Can. Co.*, 6 H. & N. 644; 30 L. J. Ex. 249.

carriages, trucks, boats, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (*n*); and every railway company and canal company having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication, or which have the terminus, station, or wharf, of the one, near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals to the other, without any unreasonable delay, and without any such preference, or advantage, or prejudice, or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public. It has been held, however, that the above section applies only to the "receiving," "forwarding," and "delivering" of traffic, and not to facilities for storing goods after they have been delivered to the consignees. Where, therefore, a railway company let the surplus land adjoining their station to one coal merchant to the exclusion of others, it was held that another coal merchant had no ground of complaint, although the first-named merchant did not require or use the whole of the surplus land for the purpose of storing his coals (*o*).

Where a railway company acted as a common carrier of goods, and issued certain scales of charge for the carriage, including the collection, loading, unloading, and delivery, and also carried goods for other carriers, to whom they made certain allowances for collection, &c., but in their dealings with a particular carrier they refused to make these allowances, it was held that the charges to the latter were not equal or reasonable, and that he might recover from the company divers extra charges paid by him over and above what had been charged to other carriers and to the public, such payments not being voluntary, but made in order to induce the company to do that which they were by law bound to do

(*n*) *Sutton* v. *Gt. West. Ry. Co.*, 35 Law J. Exch. 18; L. R. 4 E. & Ir. App. 226; 38 Law J. Exch. ; see *post*, p. 572.

(*o*) *West* v. *L. & N. W. Ry.*, L. R. 5 C. P. 622, *per* Montagu Smith and Brett, JJ., diss. Bovill, C. J., and Keating, J. As to the forwarding, &c., of through traffic from one line to another, see Railway Regulation Act, 1873, 36 & 37 Vict. c. 48, s. 11.

without requiring such payments (p). No distinction must be made by the company between one class of persons and another (q). The company cannot, therefore, charge a person, who is himself a common carrier, for a parcel or package, whatever may be its contents, more than it would charge one of the public (r). Charges for collection and delivery of parcels cannot be included in the general charge for the carriage, so as to impose upon parties who do not require these services and do not avail themselves of them the burthen of paying for them (s). No unreasonable preference or advantage can lawfully be given to any particular person or company, or to any particular description of traffic (t). But the fair interests of the railway company must be taken into consideration; and they are entitled to make a difference in their charges, where it is shown that there is a difference in the cost of carriage to the company, and in the labour and expense incurred by them in the delivery of the goods (u).

If overcharges are made they may be recovered back (x). Therefore, where a railway company charged a certain rate upon the *aggregate* weight of several packages, if addressed to the same consignee at the same place, it was held that they could not charge a common carrier *separately* upon the weight of the packages consigned to him, although, in addition to the carrier's address on the packages, there was also labelled the address of the person to whom the carrier (through his agent) intended to deliver them (y). However, this will not prevent a railway company from charging through rates to places beyond their termini, at a rate lower in proportion than that charged for part of the distance, although such part is the whole of their line, and a common carrier is not, therefore, entitled to have his packages carried over the line for such lower rate (z).

The 31 & 32 Vict. c. 119 provides (s. 16) for equal charges to passengers, where a railway company is authorized to maintain

(p) *Parker* v. *Gt. West. Ry. Co.*, 7 M. & Gr. 253; 7 Sc. N. R. 835; 11 C. B. 545; 21 L. J. C. P. 57; *Parker* v. *Brist. & Ex. Ry. Co.*, 6 Exch. 702; *L. & N. W. Ry.* v. *Evershed*, 3 Ap. Cas. 1029.

(q) See *Ransome* v. *East. Co. Ry. Co.*, 26 Law J. C. P. 91; see *post*, p. 513, *et seq.*; it seems that the convenience of the public is an element in the consideration of what may constitute an "undue" preference; see *Palmer* v. *Lond. & Brighton Ry. Co.*, L. R. 6 C. P. 194.

(r) *Parker* v. *Gt. West. Ry. Co.*; *Parker* v. *Bristol & Ex. Ry. Co.*; *L. & N. W. Ry.* v. *Evershed*, *supra*.

(s) *Baxendale* v. *Gt. West. Ry. Co.*, 16 C. B. N. S. 137; 33 L. J. C. P. 197; *Garton* v. *Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273.

(t) 17 & 18 Vict. c. 31, s. 2; see *L. & N. W. Ry.* v. *Evershed*, 3 Ap. Cas. 1029.

(u) *Ransome* v. *E. Co. Ry. Co.*, 1 C. B. N. S. 437; *Oxlade* v. *North-East. Ry. Co.*, *ib.* 454; *Baxendale* v. *East. Co. Ry. Co.*, 4 C. B. N. S. 81; 27 L. J. C. P. 137; as to tonnage rates and parcel rates, see *Parker* v. *Gt. West.*, 6 Ell. & Bl. 103.

(x) *Pegler* v. *Monmouth, &c., Ry. Co.*, 6 H. & N. 644; *Garton* v. *Bristol and Exeter Ry. Co.*, 30 Law J. Q. B. 273; *L. & N. W. Ry.* v. *Evershed*, *supra*.

(y) *Baxendale* v. *Lond. & South West. Ry. Co.*, L. R. 1 Exch. 137.

(z) *S. C.*

and work steam vessels in communication with their railway, and prohibits any reduction or advance in the fare in consequence of the persons using the steamboat having travelled, or being about to travel, by the railway or not. Where an aggregate sum for the fare by boat and rail is charged, the ticket must distinguish the amount charged for each (*Ibid*). Where two railways are worked by one company the calculation of charges by distance must be reckoned as if it was one railway (s. 18). As to agreements between railway and canal companies, see 36 & 37 Vict. c. 48, s. 16.

Carriage of packed parcels.—A railway company has no right to make an increased charge for packed parcels, in order to prevent carriers from entering into competition with them in the conveyance of goods; and there is no difference between a packed parcel sent to an individual containing parcels belonging to a variety of people, and parcels sent to an individual all the contents being his own (*a*). But in certain cases an extra charge might be made for increased risk (*b*); and, if the company has to make separate deliveries to several different persons, they are entitled to make an additional charge in respect of the increased trouble (*c*). When the duty of making equal charges to all persons is not imposed upon the company, they may impose a different rate of carriage for packed parcels from what they charge for ordinary packages (*d*).

In some cases deciding that an extra charge may be made for packed parcels, the company claimed to charge extra to carriers for packed parcels, and not to charge extra to customers who were not carriers, for what they called inclosures, which were in reality packed parcels, and the courts have held that an extra charge for a packed parcel to a carrier was against the statutes, imposing upon railway companies the duty of charging equally to all persons in respect of all goods of a like description (*e*); but the company has a right to divide goods into classes by descriptions appropriate to the different classes it chooses to make, and to make different charges for the different classes (*f*). By 31 & 32 Vict. c. 119, s. 17, it is provided that, on application by writing to the secretary of the company, by any person who has paid for the conveyance of

(*a*) *Pickford* v. *Grand Junc. Ry. Co.*, 10 M. & W. 399; *Crouch* v. *Gt. North. Ry. Co.*, 11 Exch. 755; *Piddington* v. *S. E. Ry. Co.*, 5 C. B. N. S. 120; 27 L. J. C. P. 295; *Baxendale* v. *The London and South Western Ry. Co.*, L. R. 1 Ex. 137; 35 L. J. Ex. 108; *Garton* v. *Brist. & Exeter Ry. Co.*, *supra*; *Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L. 226; 38 L. J. Ex. 177.

(*b*) *Garton* v. *Bristol & Ex. Ry. Co.*, 4 H. & N. 49; 28 L. J. Ex. 169.

(*c*) *Baxendale* v. *East. Co. Ry. Co.*, *supra*.

(*d*) *Branley* v. *S. E. Ry. Co.*, 30 L. J. C. P. 286; 12 C. B. N. S. 63.

(*e*) *Parker* v. *Gt. Western Ry. Co.*, 11 C. B. 545; *Crouch* v. *Gt. Northern Ry. Co.*, 11 Exch. 742; 25 Law J. Exch. 137; *Gt. West. Ry.* v. *Sutton*, L. R. 4 Eng. & Ir. App. 226.

(*f*) Erle, J., *Branly* v. *South Eastern Ry. Co.*, 12 C. B. N. S. 63; 31 Law J C. P. 290.

goods, the company shall render an account to the applicant distinguishing how much of the charge is for conveyance—including tolls for the use of the railway, the use of carriages, and for locomotive power,—and how much for loading and unloading, covering collection, delivery, and other expenses, but without particularising the items of such last-mentioned charge.

Injunction against railway companies to enforce compliance with the Railway and Canal Traffic Act.—By 17 & 18 Vict. c. 31, s. 3, it is enacted, that it shall be lawful for any company or person complaining against any railway company or canal company of anything done, or any omission made in contravention of the Railway and Canal Traffic Act, to apply in a summary way to the Court of Common Pleas, or any judge thereof (see note (*h*) *infra*), and that it shall be lawful for the court or judge to hear and determine the matter of the complaint, and to make inquiry, in the mode therein directed, and to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of the Act, and enjoining obedience to the same (*g*); and in case of disobedience of any such writ of injunction or interdict, to order that a writ of attachment or any other process of such court incident or applicable to writs of injunction or interdict, shall issue against any one or more of the directors of any company, or against any owner, lessee, contractor, or other person failing to obey such writ of injunction or interdict; and to make an order directing the payment by any one or more of such companies of a sum of money not exceeding for each company the sum of 200*l.* for every day, after a day to be named in the order, that such company or companies shall fail to obey such injunction or interdict, such moneys to be payable as the court or judge may direct, either to the party complaining, or into court to abide the ultimate decision of the court, or to her Majesty; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment, or order, in the nature of a writ of execution; and, in any such proceeding, the court or judge may order and determine that all or any costs thereof or thereon incurred shall be paid by or to the one party or the other, as the court or judge shall think fit (*h*).

"It is abundantly clear," observes Cockburn, C.J., "from the statutory enactments which enjoin on railway companies the obligation to afford accommodation on equal and reasonable terms, and from the provisions of the statute by which jurisdiction is given to the Court of Common Pleas against the affording of undue prefer-

(*g*) See *Ransome* v. *East. Co. Ry. Co.*, 26 Law J. C. P. 91.

(*h*) These powers are now exercised by the Railway Commissioners under the 36 & 37 Vict. c. 48, in certain cases, and their orders may be enforced by the Court.

ence, or the imposing of undue prejudice or disadvantage, that it was not the intention of the legislature to leave to railway companies the unfettered exercise of their rights as proprietors of their respective lines; but in return for the great powers which it has conceded to them, and for the monopoly of the carrying business of the country, which in a great degree they have been enabled to acquire, has imposed on them the obligation of affording accommodation on equal terms to the whole of the public;" and they cannot promote their own interest as carriers at the expense of the right of the public to that equality (*i*), or give to one individual greater advantages at their stations (*k*), or upon their line, than they allow to another (*l*).

Where a railway company, in order to compete with a particular carrier in the collection and delivery of parcels, makes a man who has his own waggons and horses, and therefore does not require the company to collect and deliver parcels for him, pay more than he ought to pay for the transit on the railway, it is a case of undue prejudice against the person not wanting the accommodation. The company have no right to make a charge nominally for carriage upon the railway, which is in reality for that and something else, and so impose upon a portion of the public services which they do not desire to avail themselves of (*m*). So if a number of tradesmen in a country town request a railway company to deliver all goods addressed to them to a local carrier for distribution by him, the company cannot, in order to compete with that carrier, under the pretence of requiring a special order as to each package, in effect cause the delivery by such carrier to be so delayed as to become impracticable (*n*). Nor can a railway company exclude carriers' vans from the delivery of goods at a station after a certain hour, if they admit vans, with goods collected from their own receiving houses, after that hour (*o*).

In execution of the powers conferred on them by this statute, the courts will issue writs of injunction, enjoining railway companies proved to have given an undue preference to one person or set of persons over another in respect of the conveyance of particular classes or descriptions of commodities, to desist from giving

(*i*) *Baxendale* v. *Gt. Western Ry. Co.*, 5 C. B. N. S. 354; 28 Law J. C. P. 69.

(*k*) *Marriott* v. *Lond. & S. W. Ry. Co.*, 1 C. B. N. S. 499; 26 Law J. C. P. 154; *Beadell* v. *East. Co. Ry. Co.*, *ib.* 250; *Baxendale, In re*, 11 C. B. N. S. 787; 12 *ib.* 758.

(*l*) *Baxendale* v. *North Devon Ry. Co.*, 3 C. B. N. S. 324; see 31 & 32 Vict. c. 119, s. 16, *ante*, p. 571.

(*m*) Cockburn, C. J., *Garton* v. *Gt. Western Ry. Co.*, 5 C. B. N. S. 678; *Baxendale* v. *Gt. Western Ry. Co.* 16 *ib.* 137; 33 Law J. C. P. 197; see 31 & 32 Vict. c. 119, s. 17, *ante*, p. 572.

(*n*) *Parkinson* v. *Gt. Western Ry.*, L. R. 6 C. P. 554.

(*o*) *Palmer* v. *Lond., Brighton & South Coast Ry.*, L. R. 6 C. P. 195.

such undue preference (*p*). But the operation of the statute is confined to undue preferences given to one person or class of persons over another in the traffic along the same railway or canal (*q*), and travelling between the same places, and not to superior advantages which may be given to one town over another town on the same line of railway (*r*). And it has been held that the statute is not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities, and full train-loads at regular periods, provided the real object of the railway company be to obtain thereby a greater remunerative profit by the diminished cost of the carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee (*s*).

Before the court will put the powers of the Railway and Canal Traffic Act in motion, as regards the granting of an injunction, the court must in general be satisfied that some substantial injury or inconvenience is sustained by the public by the act complained of; and that the complaint is *bonâ fide* made on behalf of the public (*t*). And it has been held that the exercise of this special jurisdiction being subject to no review, and depending in each instance upon the special facts of the case, cases previously decided under it are not binding on the court in the same way that precedents in law are binding (*u*).

Passenger fares—Right of a passenger to alight at intermediate stations.—Where a railway company, under the influence of competition, charged a low rate of fare to a distant locality, and sought to prevent passengers from getting down at intermediate stations, to which a higher fare was charged, on the ground that they had not paid the fare to such intermediate station, and were answerable to a bye-law, subjecting to a penalty any person who should enter a carriage without having previously paid his fare, it was held that the bye-law was wholly inapplicable; that the passenger had paid his fare; and that the company had no right to prevent him from getting down at any intermediate station (*x*).

Duties and responsibilities of common ferrymen.—A common ferryman is a common carrier, and is bound to provide safe and

(*p*) *Harris* v. *Cockermouth, &c., Ry. Co.*, 3 C. B. N. S. 693; 27 Law J. C. P. 162; *Ransome* v. *East. Co. Ry. Co.*, *ib.* 166; 8 C. B. N. S. 709; *Cooper* v. *Lond. & S. W. Ry. Co.*, 27 Law J. C. P. 324.

(*q*) *Bennett* v. *Manch., Sheff. & Linc. Ry. Co.*, 6 C. B. N. S. 715.

(*r*) *Jones* v. *East. Co. Ry. Co.*, 3 C. B. N. S. 718.

(*s*) *Nicholson* v. *Gt. Western Ry. Co.*, 5 C. B. N. S. 441; *Strick* v. *Swansea Canal Co.*, 31 Law J. C. P. 240.

(*t*) *Painter* v. *Lond. & Br. Rail. Co.*, 2 C. B. N. S. 702; *Re Caterham Ry. Co.*, 1 C. B. N. S. 410.

(*u*) *Palmer* v. *Lond. & South West. Ry. Co.*, L. R. 1 C. P. 589; diss. Willes and Keating, JJ.

(*x*) *Reg.* v. *Frere*, 4 Ell. & Bl. 598; as to the construction of this bye-law, see *Jennings* v. *Gt. Northern Ry. Co.*, L. R. 1 Q. B. 7; *Dearden* v. *Townsend*, *ibid.* 10.

secure ferry-boats, and safe slips and landing-stages, and all proper means and appliances for the safe transit of persons who may have occasion to use the ferry for themselves, or for the transit of their horses and carriages, luggage, and merchandise. Where, therefore, the defendants, as ferrymen, used steam-boats for transit across the river Mersey, from which passengers and animals could not safely land without landing-stages and slips, and they provided an insecure hand-rail to a landing-stage, which broke and caused the death of the plaintiff's mare, it was held that they were bound to make good the loss (*y*).

Loss of goods by common ferrymen and common hoymen.—Common ferrymen and common hoymen, being common carriers, are responsible for the safe delivery of goods intrusted to them for conveyance, unless they have been prevented by storm, lightning, tempest, or inevitable accident (*z*). In *Mouse's case* it was resolved "that if the ferryman surcharge the barge, it is lawful for any of the passengers in time of accident and necessity to cast the things out of the barge for safety of the lives of the passengers; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man, for 'interest republicæ quod homines conserventur'" (*a*).

Season ticket — Conditions — Forfeiture of deposit.—The plaintiff purchased a season ticket, and agreed to be bound by certain conditions, one of which was that the ticket was to be considered the property of the company to be delivered to them on the day after expiry; another was that the ticket and the deposit should be forfeited on breach of any of the conditions. A few days after expiry of the ticket the plaintiff delivered it to the company and claimed a return of the deposit; and it was held that the plaintiff could not recover the deposit (*b*).

Ruinous and insecure railway bridges, viaducts, and embankments.—Every railway company in the actual possession and occupation of its line of railway is responsible for the maintenance and preservation in a good state of repair of all its bridges, viaducts, and embankments, so that if any injuries are sustained either by persons travelling along a highway under a bridge or viaduct (*c*), or by passengers travelling along the line, from the

(*y*) *Willoughby* v. *Horridge*, 12 C. B. 751; 22 Law J. C. P. 90.

(*z*) *Amies* v. *Stevens*, 1 Str. 128; Bac. Abr. CARRIERS, B.; *Oakley* v. *Portsmouth, &c., Steam Packet Co.*, *ante*, p. 532.

(*a*) *Mouse's case*, 12 Co. 63.

(*b*) *Cooper* v. *L. B. & S. C. Ry.*, 4 Ex. D. 88.

(*c*) *Kearney* v. *L. B. & S. C. Ry.*, L. R. 5 Q. B. 411; 6 Q. B. 759.

ruinous and insecure state of such bridge or viaduct, the railway company will be responsible for the injury, whether it arose from their own neglect in not providing needful reparations, or from original faulty construction of the fabric by their engineer or contractor (*d*). If a railway embankment has been injured by some wholly unexpected and extraordinary flood, and the rails give way, and the passengers are injured without any neglect or default on the part of the company, the company is not responsible for the injuries that may be sustained by the passengers (*e*); but every railway company is bound to construct and maintain its embankments and earthworks in such a manner as to be capable of resisting all the violence of the weather, which may be expected at some time or another, though rarely, to occur, and if it fails in this duty it will be responsible in damages for negligence (*f*).

Notice of action to railway companies.—When an Act of parliament constituting and incorporating a railway company provides that no action shall be brought against the company for anything done or omitted to be done pursuant to the Act, or in execution of the powers and authorities given by the Act, unless previous notice in writing shall have been given by the party intending to prosecute such action, or unless such action shall have been brought within a certain limited period, the enactment does not in general extend to actions *ex contractu*, and does not restrain or affect the liability of the company upon contracts entered into by it in its character of a common carrier. The omission by a plaintiff, consequently, to give such notice does not preclude him from recovering damages against the company for its negligence or misconduct, or for a breach of those duties and obligations which result from the nature of its employment as a common carrier (*g*). But, where the parties were trying, in an action *ex contractu*, the right of the company to make certain charges under the particular provisions of their Act of parliament, the action was considered to be brought for something done under the Act, and notice of action was held to be necessary (*h*).

Of the parties to be made plaintiffs in actions against carriers for the loss of, or injury to, goods.—The action against a carrier for the loss of goods entrusted to him for conveyance should, in the absence of an express contract for the carriage of them, be brought by the owner of the goods; for with him, as

(*d*) *Chester* v. *Holyhead Ry. Co*, 2 Exch. 251; as to bridges at stations for passengers to cross by, see *Longmore* v. *Gt. West. Ry.*, 35 Law J. C. P. 135.

(*e*) *Withers* v. *North Kent Ry. Co.*, 27 Law J. Exch. 417.

(*f*) *Gt. West. Ry. Co. of Canada* v. *Fawcett*, 1 Moore's P. C. C. N. S. 120; see also 8 & 9 Vict c 20, s. 46

(*g*) *Palmer* v. *Grand Junc. Ry. Co.*, 4 M. & W. 749, 7 Dowl. P. C 232; *Carpue* v *Lond. & Bright. Ry. Co.*, 5 Q. B 747. See, however, the cases, *ante*, p. 522

(*h*) *Kent* v. *Gt. West. Ry. Co.*, 3 C. B. 714; 16 L. J. C. P. 72.

the party damnified, is the implied contract for their safe conveyance deemed to be made. When goods are delivered to a carrier in execution of a contract of sale, for the purpose of transmission to an intended purchaser, and no express contract founded upon a pecuniary consideration moving from the consignor has been entered into between the carrier and the consignor for the carriage of them, the law raises an implied promise for their safe conveyance in favour of the party in whom the right of property in the goods is at the time vested. If, therefore, the right of property and the risk of loss have, by a previous contract of purchase and sale, or a contract to send the goods in satisfaction and discharge of a debt due from the consignor to the consignee, passed to the consignee, the latter is the only party entitled to sue the carrier for an injury to the goods, whether such carrier be a carrier by land or a carrier by water, and whether he be named by the purchaser or chosen by the vendor (*i*). If, on the other hand, from fraud or noncompliance with the requisites of the Statute of Frauds, no actual sale has taken place, so as to transfer the right of property and the risk of loss from the consignor to the consignee, the consignor is the proper party to maintain the action (*k*). So, if a tradesman merely sends goods for approval to a particular customer, or on terms of "sale or return," or sends goods of the value of 10*l.* and upwards pursuant to an oral order or an oral contract of sale, to a person who has not given "earnest" or made a part payment, or accepted any part of the goods, and the contract is void by reason of noncompliance with the provisions of the Statute of Frauds, then, as there has been no actual sale so as to transfer the right of property and the risk of loss to the consignee, the consignor is the party to sue the carrier (*l*). But, when a special contract has been entered into between the carrier and the consignor, whereby the carrier, in consideration of a sum of money paid or agreed to be paid by the consignor as the price of the carriage of goods, agrees with him to convey them to the consignee, it is no answer to an action brought by the consignor against the carrier upon such special contract to say that he is not the owner of the goods. In such a case the action may be brought, either by the consignor with whom the express engagement was made, or by the consignee as the owner of the goods in whose behalf it was made (*m*).

(*i*) *Dawes* v. *Peck*, 8 T. R. 332; *Dutton* v. *Solomonson*, 3 B. & P. 584; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; *Brown* v. *Hodgson*, 2 Camph. 36; *King* v. *Meredith*, *ib.* 639; *Fragano* v. *Long*, 4 B. & C. 219; *Coxe* v. *Harden*, 4 East, 217; *Evans* v. *Nichol*, 4 Sc. N. R. 43.

(*k*) *Coombs* v. *Brist. & Ex. Ry. Co.*, 3 H. & N. 510; 27 L. J. Ex. 401; *Duff* v. *Budd*, 6 Moore, 469; *Stephenson* v. *Hart*, 1 M. & P. 357; 4 Bing. 476.

(*l*) *Coates* v. *Chaplain*, 3 Q. B. 489.

(*m*) *Davis* v. *James*, 5 Burr. 2680; *Bell* v. *Chaplain*, Hard. 321; *Moore* v. *Wilson*, 1 T. R. 659; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600.

Where the plaintiff, the consignor, having received goods from Amsterdam to be transmitted to the consignee in Surinam, shipped them on board the defendant's vessel, upon a bill of lading which stated that the goods were shipped by the plaintiff, that they were to be delivered in Surinam to the consignee or his assigns, and that the freight was paid by the plaintiff in London, it was held, by Lord Ellenborough, that the defendant, after having signed such a bill of lading, could not bring the ownership of the goods into question. The consideration upon which the contract was founded moved from the plaintiff; the undertaking was made to him; and he was therefore entitled to maintain the action to recover the value of the goods, and would hold the sum recovered as a trustee for the real owner (n). Where a laundress, residing at Hammersmith, was in the habit of employing a carrier to convey linen from Hammersmith to the consignee at London, and the carrier was paid by the laundress, it was held that the latter was entitled to maintain an action upon the special contract against the carrier for the loss of the goods by the way, although they belonged to the consignee (o). In these cases the bailee of the goods, who has a special property in them, may enforce the express contract entered into with the carrier, unless his principal interferes to prevent him. "The rule is, that either the bailor or the bailee may sue; and, whichever first obtains damages, it is a full satisfaction" (p). But a settlement for loss or damage, made with a person bringing the goods to the carrier, which person has no property or interest in the goods, will not be an answer to an action by the owner (q).

Every person, as we have seen (*ante*, p. 522), who has been injured by the negligent performance of the work of carrying may maintain an action for damages against the carrier, although the work was done under a special contract to which he is no party. A servant, for example, may maintain an action against a railway company, or other carrier, for injuries sustained by him from the negligent management of a train by which he was a passenger, or from the negligent execution of the work of carrying, although the contract for his conveyance was made, and the hire or fare paid, by his master, the duty of carrying carefully being a duty which arises independently of the contract (r). So, where a railway company was bound by statute to carry the mails, and the officers of the post-office who accompanied them, it was held that the company must exercise a

(n) *Joseph* v. *Knox*, 3 Campb. 320; *Sargent* v. *Norris*, 3 B. & Ald. 277.

(o) *Freeman* v. *Birch*, 1 N. & M. 420.

(p) *Nicolls* v. *Bastard*, 2 C. M. & R. 660.

(q) *Coombs* v. *Bristol & Ex. Ry.*, 3 H. & N. 1; 27 L. J. Ex. 269.

(r) *Marshall* v. *York, Newcastle, and Berwick Ry. Co.*, 11 C. B. 655; and see the cases, *ante*, p. 522.

reasonable care in performing the duty cast upon them by the statute, and were bound to carry safely; so that if any officer of the post-office was injured by the negligent management of their trains, he was entitled to maintain an action against them for damages, although the contract for his conveyance had been entered into between the company and the Postmaster-General (s).

Joint bailments to common carriers.—Where a box delivered to a carrier to be carried contained things belonging to each of the plaintiffs separately, but none in which they had a joint ownership, it was held that nevertheless there was a joint bailment in respect of which they might sue jointly (t).

Parties to be made defendants.—When goods have been delivered to the driver of a stage-coach to be carried, and have been lost by the way, an action *ex contractu* for negligence should be brought against the coach-proprietor, and not the mere servant or agent (u). But as all who participate in a wrongful act are responsible *ex delicto* for the injurious consequences of it, the servant may be sued for the breach of duty as well as the master or the employer. The 8th section of the Carrier's Act (*ante*, pp. 537, 538) provides that the Act shall not protect the coachman, guard, book-keeper, or other servants of the common carrier from liability for losses or injuries occasioned by their own personal neglect or misconduct.

Every railway company is responsible for the detention or conversion, by its officers and servants, of the property which has come into the hands of such servants and agents in the course of their employment in the business of the company. There must be some one authorized on the part of the company at every station to receive and deliver out goods, and to do things promptly that require immediate attention, and whoever is permitted by the company to have dominion over their stations, and to exercise authority over their property, and over their porters and servants, will be presumed to be clothed with the necessary authority, and his acts, done within the scope of his ordinary employment, will be binding on the company. Thus, where some young quicks were forwarded by railway to the plaintiff, and the general superintendent of the company, at the request of the plaintiff, in order to keep the quicks alive, permitted them to be put into the company's ground at the railway station, where they remained under the control and charge of the superintendent, and the latter subsequently refused to deliver them up to the plaintiff, it was held that

(s) *Collett* v. *Lond. & North Western Ry. Co.*, 16 Q. B. 989.

(t) *Metcalfe* v. *Lond. & Br. Ry. Co* 4 C. B. N. S. 318; 27 L. J. C. P. 335.

(u) *Williams* v. *Cranston*, 2 Stark. 82.

the railway company was responsible for the unlawful detention of the property by their servant (*x*).

The common carrier cannot qualify or limit his liability in respect of the negligence, want of skill, or carelessness of his servants and agents, in and about the carrying of the goods, by any private arrangement as to remuneration out of the profits of the business or otherwise, between himself and such servants or agents. " If a common carrier should allow his driver of the carriages some small things as perquisites, the master would, without all doubt, be still liable; and that is only a private agreement between master and servant, and only a different way of paying his servant's wages " (*y*).

Parties to be made defendants—Carriage of goods and passengers over distinct lines of railway.—We have already seen (*ante*, p. 564) that, where goods are delivered to and received by a railway company to be carried to a particular destination, the railway company receiving the goods is the party to be sued for the loss of or damage to them, although the loss or damage has been sustained on the line of a second or third railway company, to whom they have been delivered by the first railway company to be carried to their place of destination. The contract is made with the first railway company to whom they have been delivered, and to whom the hire for the entire journey has been paid (*a*); but both companies may, under certain circumstances, become joint contractors for the conveyance of the goods (*b*). The same rule prevails with regard to the passenger and his luggage, so that, if one fare is paid and one ticket given for the entire journey, the contract is with the company issuing the ticket and receiving the money, and not with a second or third railway company over whose line the passenger is travelling in order to reach his destination (*c*). And the company with which the contract is made will be liable for the negligence of such other railway company, the contract being that due care shall be used in carrying the passenger from one end of the journey to the other, so far as is within the compass of railway management (*d*). But every railway company which allows its railway to remain open for public traffic is responsible to passengers who sustain injury from the line being unsafe and dangerous,

(*x*) *Taff Vale Ry. Co.* v. *Giles*, 23 Law J. Q. B. 43.

(*y*) Page, J., Cas. temp. Hard. 90; and see *Hyde* v. *Trent and Mersey Nav. Co.*, 5 T. R. 397.

(*a*) *Brist. & Exeter Ry. Co.* v. *Collins*, 7 H. L. C. 231; *Coxon* v. *Gt. West. Ry. Co.*, 5 H. & N. 274; 29 L. J. Ex. 165.

(*b*) *Hayes* v. *South Wales Ry. Co.*, 9 Ir. Com. Law Rep. C. P. 474.

(*c*) *Mytton* v. *Mid. Ry. Co.*, 4 H. & N. 621; 28 L. J. Ex. 385; *Great Western Ry. Co.* v. *Blake*, 7 H. & N. 687; 31 L. J. Ex. 346; *Buxton* v. *North Eastern Ry. Co.*, L. R. 3 Q. B. 549; 37 L. J. Q. B. 258.

(*d*) *Thomas* v. *Rhymney Ry. Co.*, L. R. 6 Q. B. 266; 40 L. J. Q. B. 89. See, however, *Taylor* v. *Great Northern Ry. Co.*, *ante*, p. 529; *Wright* v. *Midland Ry. Co.*, *ante*, p. 521.

although such persons are conveyed along it in the carriages of some other company (e).

Damages in actions against carriers.—In all actions against common carriers for unlawfully refusing to receive and carry a passenger or goods, substantial damages are recoverable, as there is an injury to a right; and if the plaintiff, in consequence of the wrongful refusal (f) of the common carrier to carry him, has been obliged to take a special conveyance, and incur extraordinary expenses to reach the place to which he ought to have been carried, all such expenses (if reasonable) are recoverable, if claimed by the plaintiff, and specified in his claim as part of the damage he has sustained. So if a common innkeeper unlawfully refuses to receive and provide accommodation for a traveller, substantial damages are recoverable for the injury done to the plaintiff's right as a traveller and wayfarer to have shelter and accommodation in the common inn; and if he has been put to expense in seeking shelter and accommodation elsewhere, and has been obliged to hire conveyances to reach it, he is entitled to recover such special damage, if claimed. But the expenses incurred must be such as he would probably have incurred on his own account (g).

All persons are responsible for all the natural and legal consequences resulting from acts done by them in violation of the rights of others. The jury are entitled to look at all the surrounding circumstances, and at the conduct of the parties, to see where the blame is, and to assess the damages according to the way in which the parties have conducted themselves (h).

The amount of damages recoverable from common carriers for loss of, or injury to, goods, is regulated and controlled by the several Acts of Parliament, requiring consignors in certain cases to declare the value of the article at the time it is delivered to the common carrier to be carried (*ante*, p. 553). No greater damages than 50*l.* are to be recovered for loss of, or injury to, a horse through the neglect or default of a railway company or its officers; 15*l.* per head for neat cattle; and 2*l.* per head for sheep and pigs; unless the person sending or delivering the animals to the company shall, at the time of delivery, have declared them to be of higher value (i).

Proof of the value and of the amount of injury lies in all cases upon the person claiming compensation. If the value of horses has been declared at the time of the delivery of the animals to a

(e) *Birkett* v. *Whitehaven, &c., Ry. Co.*, 4 H. & N. 738; 28 L. J. Ex. 348.

(f) *Le Blanche* v. *London & N. W. Ry. Co., infra.*

(g) *Le Blanche* v. *London and N. W. Ry. Co.*, 1 C. P. D. 286, C. A.; *Millen* v. *Brash*, 8 Q. B. D. 35.

(h) *Davis* v. *North Western Ry. Co.*, 4 Jur. N. S. 1303.

(i) 17 & 18 Vict. c. 31, s. 7.

railway company to be carried, and the contract between the parties has been made upon that basis, the plaintiff is bound by his declaration of value, and cannot recover beyond the declared value (k).

Generally speaking, when articles of merchandise, such as corn, hops, hemp, &c., are delivered to a carrier to be carried to a market town, and the carrier fails to deliver them in the ordinary course, and the goods come to a fallen market, the difference between the marketable value of the goods at the time they would have been sold if they had been carried according to contract, and their marketable value at the earliest period at which they could have been brought to market after their delivery to the consignee, will be the measure of damages recoverable (l). If the goods have been lost altogether, the consignee is not restricted to the value of the goods at the place where they were delivered to the carrier to be carried; but, if their marketable value was greater at the place of destination than at the place of consignment, the consignee is entitled to recover that difference, as being a loss likely to arise in the ordinary course of trade (m). If there is no market at the place of delivery, the damages must be ascertained by taking into consideration, in addition to the cost price and expense of transit, the reasonable profit of the importer. Where goods were delivered to a carrier by sea to be carried from Glasgow to Vancouver's Island, and on the arrival of the ship at the latter place they could not be found, it was held that the true measure of damages was the cost of re-placing the lost articles in Vancouver's Island, with interest at 5 per cent. on the amount until judgment by way of compensation for the delay (n).

In an action against a common carrier for loss sustained by long delay in the delivery of articles of merchandise intrusted to him to be carried, whereby the consignee had lost the season for selling them to advantage, and the marketable value of the articles was seriously diminished, it was held that the carrier was answerable for this loss, it being such as might naturally be expected to result from great delay in delivering articles of merchandise (o). So, where a railway company contracted with the plaintiff, who showed goods at agricultural shows, to carry the goods to another show-ground on a particular day, the Court, although nothing was said by the parties as to the purpose for which the goods were to

(k) *M'Cance* v. *London and North Western Ry. Co.*, 7 H. & N. 477; 31 Law J. Exch. 65; 34 *ib.* 39.

(l) *Rice* v. *Baxendale*, 30 L. J. Ex. 371; *O'Hanlan* v. *Gt. Western Ry. Co.*, 6 B. & S. 484; 34 L. J. Q. B. 154.

(m) *O'Hanlan* v. *Gt. Western Ry. Co.*, *supra*.

(n) *Collard* v. *S. E. Ry. Co.*, 30 L. J. Ex. 393; *British Columbia Saw Mill Co.* v. *Nettleship*, L. R. 3 C. P. 499.

(o) *Wilson* v. *Lanc. & York Ry. Co.*, 9 C. B. N. S. 632; 30 L. J. C. P. 233.

be carried, inferred that the defendants must have known it, and that the plaintiff was entitled to damages for loss of profit which was a natural result, and that no evidence was necessary to show that he had a prospect of making profit at the particular show (*p*). But where shoe manufacturers agreed to supply a London firm with shoes for the French army, to be delivered on the 3rd of February, and gave notice that they were under contract to deliver on the 3rd, and that, if not, the shoes would be thrown on their hands, but not that there was anything exceptional otherwise in the contract, it was held that the carriers were not liable for the difference between the price the consignors had to sell the shoes at, and the agreed price, as the difference was extraordinary, and it was not such a loss as naturally arose or could be reasonably contemplated (*q*).

When the consignor has been guilty of no intentional deception to conceal the risk, and his own conduct or omission to declare the nature and value of the article has not in any way conduced to the loss, but the loss has been caused solely by the negligence and want of care of the common carrier, the latter is bound by the common law to make compensation for the loss so occasioned, to the extent, at all events, of the apparent and presumable value of the article at the time it was bailed to him to be carried. But he is not, it seems, responsible for any extraordinary or unusual value which may have accidentally been imparted to it, and which could not, from the apparent nature and general character and appearance of the thing, be fairly presumed to exist. Thus, where the plaintiff had put a 50*l*. bank-note into his carpet-bag amongst his linen and wearing apparel, and got on a coach and delivered the carpet-bag to the coachman, and on the arrival of the coach at its place of destination the bag was missed and never afterwards seen, the jury gave a verdict for the value of the linen and wearing apparel, but not for the value of the note, and the Court afterwards refused to increase the verdict by the amount of the note (*r*). In other cases, however, the plaintiff has recovered the full value of the article lost (*s*).

But the plaintiff is not entitled to recover damages for loss of wages of workmen kept unemployed by reason of the non-arrival of the goods, or for loss of profit which might have been made if the goods had been delivered in due course, if the carrier had no notice of the purpose for which the goods were wanted (*t*);

(*p*) *Simpson* v. *L. & N. W. Ry. Co.*, 1 Q. B. D. 274.

(*q*) *Horne* v. *Midland Ry.*, L. R. 8 C. P. 131; *Elbinger* v. *Armstrong*, L. R. 9 Q. B. 473; *The Parana*, L. R. 1 P. D. 118.

(*r*) *Miles* v. *Cattle*, 4 M. & P. 630; 6 Bing. 743.

(*s*) *Sleat* v. *Fagg*, 5 B. & Ald. 342; *Walker* v. *Jackson*, 10 M. & W. 161; 2 M. & P. 342; see Angell on Carriers, s. 262.

(*t*) *Le Peinteur* v. *S. E. Ry. Co.*, 36 Law T. R. 170: *Hadley* v. *Baxendale*, 23 L. J. Ex. 179; *Watson* v. *Ambery.*

and, if the carrier held the goods at the time of the loss in the character of a warehouseman, he cannot, in general, be made responsible for more than the actual value of the goods (*u*).

Where a warehouseman warehoused part of the goods at a place other than that agreed upon, and they were destroyed without negligence, it was held that the damages were not too remote (*x*). And so where an innkeeper contracted to stable horses, and then let the stables to another who turned out the plaintiff's horses which caught cold and were damaged, such damage was held not too remote (*y*).

Where the plaintiff complained that the defendant had hired him to carry a load of timber to Ipswich, and that he carried the timber there and asked the defendant where it was to be deposited, but the defendant would give no directions, and made the plaintiff's horses, which were heated, stay so long in the waggon that they took cold, and some of them died, and the rest were spoiled, it was held that the immediate and proximate cause of the injury to the horses was the plaintiff's own neglect, in not having them taken out of the waggon and put into a stable, and that the original wrongful act of the defendant, in not finding a place of deposit for the timber, was not sufficiently connected with the loss of the horses to render the defendant responsible for such loss (*z*).

If the plaintiff, being the consignor of horses or other articles, makes a declaration of value which is below their real value, in order to get them carried at a lower rate of charge, he will be bound by his declaration of value, and cannot recover more than he has himself declared (*a*).

Damages in respect of delay in delivery.—If by reason of goods not having been delivered in due time, the season for finding customers for them has passed away, and they are consequently of less value to the plaintiff, the deterioration in value may be considered in estimating the amount of damage, but not the profit which would have been made upon the sale of them if they had been delivered at the proper time (*b*); or, where the goods consist of machinery, the presumed profit which would have been made

&c., Ry. Co., 15 Jur. 418; and see *Horne* v. *Midland Ry. Co.*, L. R. 8 C. P. 131; 42 L. J. C. P. 59.

(*u*) *Henderson* v. *N. E. Ry. Co.*, 9 W. R. 519.

(*x*) *Lilley* v. *Doubleday*, 7 Q. B. D. 510.

(*y*) *McMahon* v. *Field*, 7 Q. B. D. 591; disapproving *Hobbs* v. *L. & S. W. Ry. Co.*, L. R. 10 Q. B. 111, where plaintiff's wife catching cold was held too remote.

(*z*) *Virtue* v. *Bird*, 2 Lev. 196.

(*a*) *McCance* v. *Lond. & North West. Ry. Co*, 34 L. J. Ex. 39.

(*b*) *Wilson* v. *Lanc. and York. Ry. Co.*, 9 C. B. N. S. 642; *Simmons* v. *South Eastern Ry. Co.* 7 Jur. N. S. 849; *Gt. Western Ry. Co.* v. *Redmayne*, L. R. 1 C. P. 329.

by the use of them, during the time it took to replace them (c). The right measure is the market value of the goods at the place and time at which they ought to have been delivered, or, if there is no market, then the price at the place of manufacture, with the cost of carriage, and a reasonable sum for importer's profit (d). Thus, where the plaintiff bought caustic soda of the defendant, to be shipped at a certain time, which the defendant neglected to do, and there was no market for caustic soda, it was held that the plaintiff was entitled to recover the increased freight and insurance which had become necessary by reason of the defendant's delay, and also the loss of his profit upon a re-sale of the soda to A., but not the amount of damages which he (the plaintiff) had paid A. on a sub-sale made by him to a consumer of the article (e). Hotel expenses incurred by the consignee while waiting for the delivery of the goods by the carrier are not recoverable (f).

Damages in cases of personal injuries.—A new trial will be granted in an action for personal injuries arising from a railway accident, where the damages found by the jury are so small as to show that they must have omitted to take into consideration some of the elements of damage (g), as well as where they are unreasonably large. The jury are to consider "what the plaintiff's income would probably have been, how long that income would probably have lasted, and all other contingencies to which a practice is liable (h). The measure of damages is the loss of time, expense incurred, pain and suffering, and permanent injury causing pecuniary loss (i). As to damages under Lord Campbell's Act, see Addison on Torts, 5th edition, by L. W. Cave, Q.C., p. 550.

Claims against a common carrier for refusing to carry should show that the defendant is a common carrier of goods plying for hire between the place where the goods were tendered to him for conveyance and the place to which they were addressed; that the plaintiff tendered to the defendant certain goods to be carried from the one place to the other; that the defendant had room and the means of receiving and carrying them, and the plaintiffs were ready and willing to pay him his customary hire, yet the defendant would not receive and carry the goods, whereby the plaintiffs were put to great loss and inconvenience, setting forth any special damage that may have been sustained, and concluding with a claim for damages (m).

(c) *British Columbia Saw Mill Co.* v. *Nettleship*, *supra*.

(d) *O'Hanlan* v. *Gt. West. Ry. Co.*, 34 Law J. Q. B. 154.

(e) *Borries* v. *Hutchinson*, 34 L. J. C. P. 169.

(f) *Woodger* v. *Gt. Western Ry. Co.*, L. R. 2 C. P. 318.

(g) *Phillips* v. *L. & S. W. Ry.*, 5 Q. B. D. 78.

(h) *Per* Jessel, L. J., *ib.*

(i) *Blake* v. *Mid. Ry.*, 18 Q. B. 98; *Armsworth* v. *S. E. Ry.*, 11 Jur. 758.

(m) *Pickford* v. *Grand Junction Ry. Co.*, 8 M. & W. 372.

Plea of not guilty.—Before the Judicature Acts, the plea of not guilty in actions for negligence operated as a denial only of the wrongful act alleged to have been committed by the defendant, and no defence other than such denial was admissible under that plea. Thus, in actions against a carrier for loss of, or damage to, goods, the plea of not guilty operated as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received, or of the plaintiff's property in the goods (*n*).

Special defences.—Where the defendant denies the receipt of the goods to be conveyed by him as a common carrier, or denies his receipt of them altogether, he must, by special defence allege that he did not receive the goods to be carried as in the claim mentioned. If the plaintiff has claimed against him upon his liability as a common carrier, insuring the safe conveyance of the things he carries, and it appears that the things were delivered to him under a special contract, the cause of action will be disproved under this defence (*o*). If he denies the plaintiff's title or right to the possession of the property, he must allege that the property was not, at the time he received it to be carried, the property of the plaintiff (*p*); or, admitting that the plaintiff was the owner of the property at the time it was delivered to him, he may show that the plaintiff's right to the possession of it ceased, or had been determined, and that some third party had, since the bailment, become entitled to the property, and had demanded it of the defendant (*q*).

If the defendant relies upon the Common Carrier's Act, he must by his defence show that the articles delivered to him for conveyance were of the description mentioned in the statute, and that at the time of the delivery of them to him to be carried, the value and nature of the goods were not declared by the plaintiff (*r*).

Evidence at the trial—Proof of the bailment.—To charge the common carrier for the loss of goods, however occasioned, it must of course be shown that the goods were either actually or constructively bailed to him or his servants to be carried. They must either have been delivered into his hands or into the hands of his servant or agent, or some person authorized by him to receive them. If they were merely deposited in the yard of an inn, or upon a

(*n*) Reg. Gen. Hil. Term, 16 Vict.; 1 Ell. & Bl. App. lxxxi., lxxxii.

(*o*) *White* v. *Gt. Western Ry. Co.*, 2 C. B. N. S. 7.

(*p*) *Cheesman* v. *Exall*, 6 Exch. 341.

(*q*) *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 618; *Europ. and Austral. R. M. Co.* v. *R. M. St. P. Co.*, 30 Law J. C. P. 247.

(*r*) *Pianciani* v. *London and South Western Ry. Co.*, 18 C. B. 229; *Hart* v. *Baxendale*, 6 Exch. 789; 21 L. J. Exch. 123.

wharf to which the carrier resorts, or were placed in his cart, vessel, or carriage, without his knowledge and acceptance, or that of his servants or agents, there has of course been no bailment or delivery of the goods to him (*s*), and he cannot consequently be made responsible for the loss of them. If the common carrier's servant has been induced by the consignor to depart from the usual course of dealing, and to receive goods which he was not bound to receive and carry, under circumstances of hazard known to the consignor, but not disclosed to the carrier's servant, or on terms different from those on which alone he was authorized to receive them, the carrier will either not be responsible for the loss of the goods, as never having been delivered to him, or, at all events, not on his common-law liability of an insurer (*t*). If the consignor has made a private bargain with the driver of the cart or coach of the common carrier for the conveyance of a parcel for a gratuity which was not intended by the parties to find its way into the pocket of the carrier, there has been then no bailment to the latter, and he is not consequently liable in case the parcel is lost. The bailment in such a case is a bailment to the driver alone, and he alone is responsible for the loss (*u*).

If the plaintiff has merely hired the cart or carriage of the common carrier, and has sent his own servants with the goods to take charge of them, and there has been no actual delivery or bailment of the goods to the carrier, the latter is not responsible for their safety (*x*). If a passenger travelling on the outside of a stage-coach has kept a parcel or package in his own hands, and under his own care, or taken it with him into the interior of the vehicle, without the knowledge of the carrier or his servants, and the thing is lost, the carrier is not responsible for the loss, as the article was never delivered to him or to his servants, or in any way intrusted to his or their keeping. But if the thing has been tendered to the carrier for conveyance, and the latter has directed the passenger to place it in or upon any portion of the vehicle, there has been a constructive bailment or delivery and acceptance of the goods, so as to charge the carrier for the loss of them. If luggage is placed with the knowledge of the carrier or his servants under the seat on which the passenger sits, the carrier will be responsible for its safe conveyance and delivery to the passenger at the place of destination (*y*). A delivery of goods to a person sent or appointed

(*s*) *Selway* v. *Holloway*, 1 Ld. Raym. 46; *Buckman* v. *Levi*, 3 Campb. 414; *Lovett* v. *Hobbs*, 2 Show. 128.

(*t*) *Edwards* v. *Sherratt*, 1 East, 604; *Slim* v. *Gt. Northern Ry. Co.*, 23 Law J. C. P. 166.

(*u*) *Butler* v. *Basing*, 2 C. & P. 613; *Bignold* v. *Waterhouse*, 1 M. & S. 259; *Middleton* v. *Fowler*, 1 Salk. 282.

(*x*) *East India Co.* v. *Pullen*, 2 Str. 690.

(*y*) *Richards* v. *London, Brighton, &c., Ry. Co.* 7 C. B. 848; 18 Law J. C. P. 251; and other cases, *ante*, p. 546.

by the carrier to receive them is, of course, a delivery to the carrier himself (*z*).

Proof of a special contract.—We have seen that every special contract, notice, or condition, respecting the acceptance and carriage of goods by railway and canal companies, must be signed by the party sought to be affected thereby (*ante*, p. 555); and the signature must be fairly obtained, for where a person who was unable to read was told by a clerk of the company that the paper was a mere matter of form and of no consequence, and he signed the paper relying upon this assurance, it was held that the paper so foisted upon him was not binding (*a*).

If the plaintiff has declared against the defendants as common carriers, alleging that they received the goods to be carried by them as common carriers, and it turns out that they were received under a special contract (*ante*, p. 555), the evidence will fail to support the declaration, unless it be shown that the special contract was unreasonable and void (*b*).

Proof of felony by a carrier's servants.—When, in consequence of the plaintiff's not having paid the extra price for lost articles of value, he is not entitled to recover, unless he shows that the things have been stolen by the carrier's servants, it is not enough for him to make out a probable case against some one or more of the carrier's servants. He must show that the things were lost under circumstances wholly inconsistent with their having been stolen by a stranger (*c*).

Proof of jus tertii by a common carrier.— A carrier who has received goods from a consignor is not estopped from denying the title of the latter to the goods. Common carriers are bound to receive goods properly tendered to them for carriage, and can make no inquiries into the ownership of them. "The law protects them against the real owner if they have delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse to receive the goods in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a common carrier furnishes ample ground for so holding" (*d*).

Contracts for the transmission of messages by electric telegraph —Limitation of liability.—Acts of parliament under which

(*z*) *Syms* v. *Chaplin*, 5 Ad. & E. 634; 1 N. & P. 129.

(*a*) *Simons* v. *Gt. Western Ry. Co.*, 2 C. B. N. S. 620.

(*b*) *White* v. *Gt. Western Ry. Co.*, 2 C. B. N. S. 17; *Latham* v. *Rutley*, 2 B. & C. 20.

(*c*) *Metcalfe* v. *London and Brighton, &c., Ry. Co.*, 27 Law J. C. P. 333. See also *M'Queen* v. *G. W. Ry. Co.*, *ante*, p. 551; *Vaughton* v. *L. & N. W. Ry. Co.*, *ante*, p. 552.

(*d*) *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 618; 28 Law J. C. P. 58; *Cheesman* v. *Exall*, 6 Exch. 341, overruling *Laclouch* v. *Towle*, 3 Esp. 114.

electric telegraph companies were incorporated generally provided that the telegraph should be open for the sending and receiving messages by all persons alike, without favour or preference, subject to any reasonable regulations made by the company. It was held to be a reasonable regulation for the company to stipulate that they would not be responsible for mistakes made in the transmission of messages, unless the messages were repeated, and an additional payment made for such repetition of the message (*e*). If a telegraph company negligently made a mistake in the transmission of a message, it was liable to the sender only, and not to the receiver, although the latter may have acted on the message so erroneously transmitted, and may have sustained damage by so doing (*f*). The government, through the Postmaster General, became the purchasers of the telegraph companies, under the 31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73; 33 & 34 Vict. c. 88. By the first of these Acts (s. 6) and by the last (s. 8) agreements, &c., made with the companies may be enforced against the Postmaster General. Post Office officials cannot, however, be held liable for negligence, for they are the servants of the government or the public (*g*).

(*e*) *McAndrew* v. *Elect. Tel. Co.*, 17 C. B. 13.

(*f*) *Playford* v. *The United Kingdom Electric Telegraph Company Limited*, L. R. 4 Q. B. 706; 38 L. J. Q. B. 249; *Dickson* v. *Reuter's Tel. Co.*, 2 C. P. D. 62; 3 C. P. D. 1, C. A.

(*g*) See Horace Smith on Negligence, p. 134, note (*p*).

CHAPTER III.

CONTRACTS OF SECURITY.

SECTION I.

GENERAL PRINCIPLES.

The contract of mortgage, founded upon our common law doctrine of conditions, is a contract whereby a debtor grants or conveys an estate or interest in land, or transfers goods and chattels to his creditor, subject to a proviso that, if the debt is discharged by a day named, the grant or transfer shall be void, and the debtor shall be again entitled to his lands or his goods, and shall hold them as if the grant or transfer had never been made. The debtor who makes a grant or transfer is called the mortgagor, and the creditor to whom it is made the mortgagee. By a contract of this description the right of property in the thing mortgaged passes to the creditor, subject to be divested by the payment of the debt at the appointed time (*a*).

In ancient times, lands yielding fruits and profits, and living animals and chattels bearing increase, were conveyed and transferred by debtors to their creditors upon trust to apply the proceeds and profits thereof in liquidation of the debt, and, as soon as the debt was extinguished, to render them back again. This description of pledge was denominated *vivum vadium*, or a live or living pledge, because it was constantly fructifying and paying off the debt, and working its own redemption. When, on the other hand, the things transferred to the creditor, to be held as security for the due payment of the debt, yielded no profits and bore no fruits of increase, or the proceeds and profits thereof were not to be applied in liquidation of the debt, but the things themselves were to be absolutely forfeited and to become the property of the creditor in the case of the non-payment of the debt at the appointed time, it was called *mortuum vadium*, or dead pledge, and hence the derivation of our modern term "mortgage" (*b*).

(*a*) *Ryall* v. *Rowles*, 1 Ves. senr. 358. (*b*) Beam's *Glanville*, 252.

The contract of pledge is a bailment or delivery of goods and chattels by one man to another, to be held as a security for the payment of a debt or the performance of some engagement, and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the debt is discharged, or the engagement has been fulfilled. The thing deposited as a security is called a pawn or pledge; the party making the deposit, the pawnor or pledgor; and the person who receives it into his possession, the pawnee or pledgee. The contract is to be distinguished from the contract of hypothecation by the transfer of the possession, or the actual tradition or delivery of the thing intended to be charged, to the creditor (c), and from the contract of mortgage by the absence of a transfer of the ownership or right of property thereof to the pawnee during the continuance of the trust. A written memorandum of deposit or pledge, therefore, does not require a mortgage stamp; but it will, in general, require an agreement stamp (d). If the thing intended to be burthened with the debt or charge remains in the possession, order, and disposition of the owner, there is no pledge. By a pledge, therefore, of goods and chattels the right of possession is altered, but not the right of property. The pawnee, during the continuance of the contract, is the lawful possessor, and has a special property in the chattel as a bailee; but the general right of property and ownership still continue in the pawnor (e). *A lien*, on the other hand, gives no right of property to the person entitled to it, but is merely a personal right to retain goods, and continues only so long as the holder keeps possession, either by himself or his servant. There is, therefore, no right to sell or otherwise dispose of the subject matter of the lien (f).

The distinction between the contract of pledge and the contract of hypothecation, in the Roman law, is thus marked in the Institutes: "By the term pledge is meant that which has actually been delivered to a creditor, especially if the thing was a movable; and by the word hypothecation we comprehend what is obliged to a creditor by a mere agreement without any delivery" (g). The contract of pledge, like the contract of hypothecation, is accessorial to a principal debt or obligation, which may be the pawnor's own debt or obligation, or the debt or obligation of a third party. It is in all cases a security for every part of the debt

(c) *Proprie pignus dicimus quod ad creditorem transit, hypothecam cum non transit possessio ad creditorem*; Dig. lib. 13, tit. 7, lex 9, s. 2, lex 35, s. 1.

(d) *Harris* v. *Birch*, 9 M. & W. 594.

(e) *Ratcliff* v. *Davies*, Cro. Jac. 244; *Ryall* v. *Rolle*, 1 Atk. 167; Bac. Abr. BAILMENT, B.

(f) Gibbs, C. J., *Pothonier* v. *Dawson*, Holt N. P. 385.

(g) Inst. lib. 4, tit. 6, s. 7.

or engagement, so that, if a portion is discharged, the pledge remains as a security for the residue (*h*).

The contract of hypothecation, as it existed among the Greeks and Romans, was a contract whereby a debtor charged certain specific property or all his property generally with the payment of a certain debt. It derived its name from the Greek word, *ὑποθήκη*, from *ὑπό* and *τίθεσθαι*, to place under an obligation, the property being subjected to a specific charge. No right of property in the thing hypothecated was, by this contract, transferred to the creditor, nor any right to the possession thereof; but the debt was tacked on to the property, so that the creditor had a right to follow it through whatever hands it might happen to pass, and attach it, and sell it in satisfaction and discharge of the debt. A contract or power of this kind which enabled one man to have the visible ownership, and another a secret power of disposal of property, was liable to great abuse, and afforded a great temptation to fraud; and this was sought to be guarded against by making the contract public and notorious, so that all persons dealing with hypothecated property might be put upon their guard, and be furnished with the means of ascertaining the nature and extent of the charges upon it (*i*). Hypothecation by the French law is either legal, judicial, or conventional. Under the term "legal hypothecation" are comprehended all such charges and liens upon property as arise by implication and intendment of law. By a judicial hypothecation is meant that description of charge or claim upon property which results from the judgments of the courts of justice, and from judicial acts; and a conventional hopothecation is that which is founded purely upon contract. This last description of hypothecation "can only be consented to by an act passed in authentic form before two notaries, or before one notary and two witnesses" (*k*).

SECTION II.

MORTGAGE, ETC., OF REALTY.

Mortgage of lands and tenements.—The owner of an estate or interest in land, who grants or conveys away his interest, may annex whatever condition he pleases to the grant upon the principle that *cujus est dare ejus est disponere;* and, therefore, if he wants to raise money and give security for its repayment, he may grant

(*h*) Pothier, Nant. Nos. 43, 46; Domat, liv. 3, tit. 1, s. 1.

(*i*) Sir Wm Jones, Com Isæus.

(*k*) Cod. Civ. liv. 3, tit. 18, 2127.

his estate to the lender, annexing to such grant a condition that, if he repays the sum advanced by a day certain, the grant shall be void, and he shall be entitled to re-enter and re-possess the land. When lands or tenements are granted to be holden by the grantee and his heirs and assigns for ever, subject to such a condition, the grant is a mortgage in fee. When they are granted to be holden for a term of years, it is a mortgage for a term of years. In either case the estate granted is a defeasible estate. If the act to be done is performed at the appointed period, the grant or demise is at an end, and the grantor is seized or possessed of his old estate; if it is not performed, the grantee holds the estate discharged of the condition, and becomes the legal owner of the estate in the property, in accordance with the strict terms and stipulations of the contract. In the first case, the estate is revested in the mortgagor by the mere performance of the condition. In the latter, it cannot be re-vested in him without a fresh conveyance from the mortgagee. If by the terms of the contract the mortgagor is to remain in possession of the property and receive the rents and profits thereof until the day of payment, or for any determined period, he becomes tenant to the mortgagee, and there is a demise of the premises for the intervening period (*l*). If, on the other hand, there is no term or stipulation in the contract clothing the mortgagor with the right of possession until the time of payment has arrived, the mortgagee has the right of possession as well as the right of property the instant the mortgage is executed, and may, when the mortgagor is himself the occupier of the mortgaged property, enter upon and take possession of the mortgaged premises, or enforce such right through the medium of an action (*m*).

If the mortgaged money is tendered at any period of the day appointed for the payment of it, the condition is saved for ever, the grant is void, and the mortgagor has a right to re-enter and hold the land as of his former estate (*n*). If a lease is assigned by way of mortgage, the mortgagee will be liable, as the assignee of the term, to all covenants in the original lease running with the land, although he never entered or took actual possession of the estate (*o*). The existence of the mortgage does not deprive the mortgagee of his remedies as a creditor against the mortgagor personally for the recovery of the debt secured by the mortgage. If, therefore, the mortgage-deed contains no covenant for the re-

(*l*) *Wilkinson* v. *Hall*, 3 Bing. N. C. 508; 4 Sc. 301; *Doe* v. *Goldwin*, 2 Q. B. 143; *Partridge* v. *Bere*, 1 D. & R. 272; 5 B. & Ald. 604.

(*m*) *Rogers* v. *Grazebrook*, 8 Q. B. 895; *Doe* v. *Lightfoot*, 8 M. & W. 553; *Doe* v. *Maisey*, 8 B. & C. 767; *Doe* v. *Giles*, 2 Moo. & P. 749; *Doe* v. *Day*, 2 Q. B. 147.

(*n*) Bac. Abr. MORTGAGE, 637; CONDITION, 141, 144—146; Co. Litt. 218, 219.

(*o*) *Williams* v. *Bosanquet*, 1 B. & B 238.

payment of the money advanced, an action for money lent will lie (*p*). The delivery up of the mortgage-deed will not of itself cancel the mortgage debt (*q*).

A security for money lent may be made in the form of a conveyance upon trust to sell, and although in such a case some of the incidents of a mortgage are not present (as for instance a right to foreclose), yet in substance the conveyance is a mortgage (*r*).

A form of statutory mortgage is given in Third Schedule, Part I., of the Conveyancing and Law of Property Act, 1881, to which form covenants are attached by sects. 26 and 28, and modes and conditions of transfer, and re-conveyance by sects. 27 and 29 (*s*).

Rights of the mortgagee when the mortgagor is in occupation of the mortgaged premises.—The courts will not infer, from the mere insertion in the mortgage-deed of a covenant on the part of the mortgagor that it shall be lawful for the mortgagee, *after* default made in payment of the debt at the time appointed, or after giving "one month's notice," to enter upon the mortgaged lands, any covenant on the part of the mortgagee that it shall be lawful for the mortgagor to retain possession until default made; and such a covenant does not, consequently prevent the mortgagee from entering immediately after the execution of the mortgage (*t*); but, if, from the mutual covenants of the parties and the general context of the deed, it appears to have been plainly intended that the mortgagor should have possession until default, the courts will give effect to such intention (*u*). Whenever the mortgagor is merely permitted to occupy the mortgaged premises, or to receive the rents and profits thereof, without being expressly clothed with the right of possession, he possesses the premises at sufferance in the strictest sense; and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop he has sown. So far as regards the possession of the land he is not even tenant at will to the mortgagee; but he receives the profits of the land for his own use, and not as an agent or bailiff of the mortgagee; and, when he has once received them he is entitled to keep them as his own. If, by the mortgage-deed, power is given to the mortgagee to enter upon the premises and distrain for interest in arrear in like manner as for rent reserved on a lease, the exercise of the power is no recognition of the mortgagor as tenant or lessee, and does not preclude the mortgagee from bringing an action of ejectment without demand of possession or notice to

(*p*) *Yates* v. *Aston*, 4 Q. B. 182; *Mathew* v. *Blackmore*, 1 H. & N. 762; but see *Painter* v. *Abel*, 9 Jur. N. S. 949, 950.

(*q*) *Hurst* v. *Beach*, 5 Mad. 351.

(*r*) *In re Alison*, 11 Ch. D. 284.

(*s*) 44 & 45 Vict. c. 41, ss. 26—29; also as to what covenants are in future to be implied in a mortgage, see sect. 7 (C.).

(*t*) *Doe* v. *Lightfoot*, 8 M. & W. 564; *Doe* v. *Day*, 2 Q. B. 147; *Rogers* v. *Grazebrook*, 8 Q. B. 895.

(*u*) *Wheeler* v. *Montefiore*, 2 Q. B. 142.

quit (*x*). A power of distress of this sort being a mere personal licence to enter and distrain, is not assignable over (*y*). But if a tenancy is created, the power is annexed to the tenancy, and goes with the reversion (*z*).

When the mortgagor becomes tenant to the mortgagee.—If the mortgage-deed contains a clause whereby the mortgagor attorns and becomes tenant to the mortgagee at a specified annual rent payable half-yearly so long as the mortgage-money remains secured upon the mortgaged premises, and the mortgagor continues in the occupation of the mortgaged premises and pays rent, the subsequent occupation taken in connexion with the clause of attornment constitutes the relation of landlord and tenant between the parties, and the mortgagee may distrain for the rent, although he never himself executed the mortgage-deed (*a*). And this is so though there may have been a prior mortgage and attornment to another mortgagee (*b*). Such attornment clause must be *bonâ fide*, and not merely for the purpose of enabling the mortgagee to oust the creditors (*c*). The proceeds of a distress for rent under an attornment clause are applicable to the payment of principal as well as interest (*d*). When the mortgage-deed contains a clause of this description, a right of entry should be reserved in default of payment of the rent, so as to enable the mortgagee, in case the rent remains unpaid, to enter upon the lands or bring an action of ejectment, without giving a notice to quit (*e*). If by the terms of the mortgage-deed the mortgagor is to hold possession for any certain or determined period, there will then be a demise to him of the mortgaged estate for the term specified. If he is to hold until the happening of some uncertain event, he will have a conditional estate, and will be tenant to the mortgagee until the event has happened. If the mortgage-deed contains a clause of attornment, or creates a tenancy as between the mortgagor and mortgagee, but does not create any definite or certain term of holding, the mortgagor will be tenant at will. The reservation of a yearly rent is not inconsistent with a tenancy at will (*ante*, p. 219). Therefore, a clause in a mortgage-deed that the mortgagor shall become tenant to the mortgagee at a yearly rent does not necessarily create a yearly tenancy (*f*). If by the mortgage-deed it is cove-

(*x*) *Doe* v. *Goodier*, 16 L. J. Q. B. 435.

(*y*) *Brown* v. *Metropolitan Counties Life Assurance Co.*, 28 L. J. Q. B. 236.

(*z*) *Jolly* v. *Arbuthnot*, 28 L. J. Ch. 547.

(*a*) *West* v. *Fritche*, 3 Exch. 216; *Morton* v. *Woods*, L. R. 3 Q. B. 658; *ib.* 4 Q. B. 302; 37 L. J. Q. B. 242; 38 *ib.* 81; *In re Threlfall*, 16 Ch. D. 274.

(*b*) See *Ex parte Punnett*, 16 Ch. D. 226.

(*c*) *Ex parte Jackson*, 14 Ch. D. 725.

(*d*) *Ex parte Harrison*, 18 Ch. D. 127.

(*e*) *Doe* v. *Tom*, 4 Q. B. 615; *Metropolitan Counties Assurance Co.* v. *Brown*, 4 H. & N. 434; 28 L. J. Ex. 340.

(*f*) *Doe* v. *Davies*, 7 Exch. 89; 21 L. J. Ex. 60; *Doe* v. *Goldwin*, 2 Q. B. 143.

nanted or agreed that the mortgagor shall hold as tenant at will to the mortgagee at an annual rent recoverable by distress, and the mortgagor demises the premises to a third party, the tenancy at will is not determined, and the mortgagee is not deprived of his right to distrain (*g*). Where it was provided that, in case of default in payment, the mortgagor should hold the premises as yearly tenant to the mortgagees from the date of the deed at a specified rent, and that they should have the same remedies for recovering the rent as if the same had been reserved upon a common lease, and, the mortgagor having made default the mortgagees, after the lapse of more than a year from the default, distrained as for a year's rent in arrear, it was held that, not having given him any notice of their intention to treat him as tenant, they were not entitled to distrain (*h*).

When the mortgaged premises are in the possession and occupation of lessees or tenants holding under leases granted by the mortgagor prior to the making of the mortgage, the mortgagee, of course, takes the mortgaged premises subject to those leases. The mortgage in such a case operates as a grant of the reversion and with it of the rent; and the mortgagee is entitled, as assignee of the reversion, to the rent reserved on such leases, after he has given the lessees notice of the mortgage, and required them to pay their rents to him. Though attornment is no longer necessary to perfect the title of a mortgagee of the reversion to the rent reserved on the demise, yet notice of the grant or mortgage must be given to the tenants to enable the mortgagee to maintain an action against them for use and occupation, or to distrain for arrears of rent (*i*). When there is no clause in the mortgage-deed giving to the mortgagor a right to the possession of the mortgaged premises, and creating a tenancy between the mortgagor and mortgagee, the mortgagee has a right to all the rents which have become due subsequently to the making of his mortgage, and which are unpaid at the time the occupying tenant from whom such rent is due receives notice of the mortgage. The tenant is not bound to pay the mortgagee without notice; and if, at the time he receives notice, he has paid the rent to the mortgagor, it is a good excuse for him (*k*); but payment of the rent to the mortgagor before it is due is no answer to a claim by the mortgagee for rent which has accrued due after the giving of the notice (*l*). When lands in the

(*g*) *Pinhorn* v. *Souster*, 8 Exch. 763; 22 L. J. Ex. 266; *Brown* v. *Metropolitan Counties Assurance Co.*, 28 L. J. Q. B. 236.

(*h*) *Clowes* v. *Hughes*, L. R. 5 Ex. 160; 39 L. J. Ex. 62.

(*i*) 4 & 5 Ann. c. 16, ss. 9, 10; *Moss* v. *Gallimore*, 1 Doug. 279; 1 Smith's L. C. 543; *Lumley* v. *Hodgson*, 16 East, 99; see *Allcock* v *Moorhouse*, 9 Q. B. D. 366.

(*k*) Buller, J., *Birch* v. *Wright*, 1 T. R. 384, 385.

(*l*) *De Nicholls* v. *Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *Cook* v. *Guerra*, L. R. 7 C. P 132; 41 L. J. C. P. 89; *ante*, p. 223.

possession of tenants holding underleases have been mortgaged, the mortgagee, as assignee of the reversion, may sue on any of the covenants which are annexed to the reversion and run with the land; and he is also liable to be sued thereon. Hence it followed that, whenever a man had demised to a tenant at a rent, and then had mortgaged his reversion, the mortgagor could not bring an action of ejectment, nor an action for the rent in his own name, nor sue upon any covenants running with the land, whether the mortgagee had or had not given notice of the mortgage, for the tenant might avail himself of the defence that the lessor had assigned all his estate and interest in the demised premises (*m*). But, by the Supreme Court of Judicature Act (*n*), "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." And, if the mortgagee does not give notice to the tenant to pay the rent to himself, but permits the mortgagor to go on receiving the rent as before the mortgage was made, and does not think fit to interfere with the tenancy, the mortgagor is deemed in law to have authority from the mortgagee to distrain for the rent if it falls into arrear, the rent being the obvious and natural source for the mortgagor to obtain funds from, to enable him to pay the interest of the mortgage debt. He may distrain in the mortgagee's name as the mortgagee's bailiff; and, if he distrains in his own name, he may justify in the name of the mortgagee (*o*).

Leases by the mortgagor and mortgagee after the making of the mortgage.—If no right of possession is reserved by the mortgage deed to the mortgagor, and no tenancy is created between him and the mortgagee, and the mortgagor remains in possession on sufferance after the making of the mortgage, and demises the mortgaged land to a tenant at a rent, the demise is absolutely void as against the mortgagee, but it is nevertheless valid, by estoppel, as between the mortgagor and his tenant until the mortgagee interferes, and the mortgagor is entitled to receive the rent for his own use, and to distrain for it in his own name, if it is not

(*m*) *Doe* v. *Edwards*, 5 B. & Ad. 1065; *Mountnoy* v. *Collier*, 1 Ell. & Bl. 636.

(*n*) 36 & 37 Vict. c. 66, s. 25 (5).

(*o*) *Trent* v. *Hunt*, 9 Exch. 14; 22 L. J. Ex. 320; *Snell* v. *Finch*, 9 Jur. N. S. 333.

paid when due, so that a tenant who has come in under the mortgagor after the mortgage, and has neither paid rent to the mortgagee, nor been evicted by him, either actually or constructively, before the day of payment, cannot defend an action by the mortgagor for that rent. Mere notice by the mortgagee to the tenant to pay the rent to the mortgagee is not an attornment to the latter, and is, without actual payment, no answer to the claim for rent (*p*). And, if the mortgagor assigns his interest, such as it is, his assignee has the same title by estoppel against the lessee, and, as assignee of the reversion by estoppel, may sue the tenant for waste in breach of the covenants in the lease (*q*). As between himself and the tenant, the mortgagor may exercise all the ordinary rights of a landlord, unless the mortgagee interferes to prevent him; for the lessee cannot deny the title of his lessor at the time of granting the lease (*r*). But the tenant who comes in under such a demise may be treated by the mortgagee as a trespasser, and may be ejected without any notice to quit (*s*), unless the mortgagee is a party to, or has authorized the making of, tho lease; or he may be converted into a tenant to the mortgagee by continuing to occupy the mortgaged premises by the sufferance and permission of the mortgagee, after he has received notice of the mortgage. The mortgagee cannot, by giving notice to the tenant, entitle himself to distrain for the rent that the tenant has contracted to pay to the mortgagor; nor can he sue for any arrears of such rent (*t*). But, if there is a clause in the mortgage-deed creating a tenancy as between himself and the mortgagor at a specified rent, he may, of course, distrain on the mortgaged premises for that rent. And, if rent is due on a demise from the mortgagee to the mortgagor after the making of the mortgage, and the mortgagee threatens to distrain for such rent, or to evict the tenant and the latter pays the rent to avoid the threatened distress or eviction, such payment is a good payment as against the mortgagor on the ground that the tenant has been compelled to pay for the mortgagor what the mortgagor ought himself to have paid (*u*).

By the Conveyancing and Law of Property Act, 1881, a mortgagor in possession and a mortgagee in possession have, as against incumbrancers, power to make agricultural or occupation

(*p*) *Hickman* v. *Machin*, 4 H. & N. 720; 28 L. J. Ex. 310.

(*q*) *Cuthbertson* v. *Irving*, 29 L. J. Ex. 485; 6 H. & N. 135.

(*r*) *Wheeler* v. *Branscombe*, 5 Q. B. 373; *Wilton* v. *Dunn*, 17 Q. B. 294.

(*s*) *Keech* v. *Hall*, 1 Doug. 21; *Thunder* v. *Belcher*, 3 East, 449.

(*t*) *Rogers* v. *Humphreys*, 4 Ad. & E. 299; *Wilton* v. *Dunn*, 21 L. J. Q. B. 63; *Turner* v. *Cameron's Coal, &c.*, 5 Exch. 932.

(*u*) *Johnson* v. *Jones*, 9 Ad. & E. 809; *Mayor of Poole* v. *Whitt*, 15 M. & W. 577.

leases (*x*) for twenty-one years, and building leases for ninety-nine years (*y*), if made according to the provisions of the section (*z*). A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease, if granted, would be binding (*a*).

Notice of the mortgage to the lessee creates a new tenancy between the tenant and the mortgagee, and enables the latter to sue for a reasonable satisfaction for the use and occupation of the property by the tenant subsequent to the receipt by him of the notice (*b*). If the mortgagee gives the tenant notice to pay his rent to him, and the tenant continues in possession after the receipt of the notice, he will be deemed to hold as tenant at will to the mortgagee at the rent reserved in the lease; but, as soon as rent has been paid to and accepted by the mortgagee, the tenancy will be converted into a yearly tenancy (*c*). A mortgagee who gives notice of the mortgage to a tenant let into possession by the mortgagor subsequently to the making of the mortgage, cannot maintain an action for mesne profits in respect of the occupation of the land by such tenant prior to the receipt of the notice; for the doctrine of relation applies only as between disseisor and disseisee, and an estate which was lawful at its commencement cannot be made tortious by a subsequent act (*d*). Neither can the mortgagee maintain an action against such tenant for the recovery of any satisfaction in respect of the use and occupation of the mortgaged property prior to the receipt of the notice; for there is no contract between the mortgagee and the tenant before notice of the mortgage (*e*).

Equity of redemption of the mortgagor.—Equity, looking at the substance and not at the form of the contract of mortgage, regards it as a mere pledge of land to secure the payment of a debt, and will not, consequently, suffer the land to be forfeited, by reason of the non-payment of the mortgage debt at the exact time or place or in the particular mode specified. The mortgagor is considered to be the owner of the equitable estate, and to be entitled to redeem the estate on payment of the mortgage debt and interest, until his right of redemption has been barred by a decree of foreclosure. The equi-

(*x*) Any letting or agreement to let in writing or not; see sect. 18 (17).

(*y*) Leases are not to be made for a longer term or on any conditions except such as could be granted or imposed by the mortgagor with the concurrence of the incumbrancers without the Act, s. 18 (15).

(*z*) 44 & 45 Vict. c. 41, s. 18. This section only applies when no contrary intention is expressed in writing (13) (14).

(*a*) Sect. 18 (12). The section only applies to mortgages after the Act, but it may be agreed to apply it to those before the Act, so as not to prejudicially affect any right of a mortgagee not adopting the agreement.

(*b*) *Waddilove* v. *Barnett*, 2 Bing. N. C. 543; *Carpenter* v. *Parker*, 3 C. B. N. S. 237; 27 L. J. C. P. 78.

(*c*) *Doe* v. *Bucknell*, 8 C. & P. 566; *Brown* v. *Storey*, 1 Sc. N. R. 16.

(*d*) *Litchfield* v. *Ready*, 5 Exch. 944; Buller, J., 1 T. R. 382.

(*e*) *Turner* v. *Cameron's Coal, &c.*, 5 Exch. 932.

table interest in the land is denominated "the equity of redemption," and is, in truth, the mortgagor's old estate, unaffected in equity by the legal forfeiture, but encumbered with the lien of the pledgee. There may be a seizin of it just the same as of any other estate. It may be devised, granted, mortgaged, or entailed with remainders (*f*); and it will follow the same line of descent as the land itself would have followed if no mortgage had been made. Thus, if the mortgaged land be of gavel-kind tenure, the equity of redemption will be divisible amongst the heirs of the mortgagor; if, on the other hand, the tenure be Borough-English, the equity of redemption will descend to the youngest son (*g*).

Equity treats every contract as a pledge, which is, in principle and effect, a pledge, whatever name the parties may choose to give to the transaction, and whatever may be the disguises resorted to for concealing the real nature of the contract. Therefore, if an estate is conveyed in consideration of a sum of money, and the conveyance appears upon the face of it to be an absolute sale and conveyance, but is accompanied by a contemporaneous deed, whereby the grantee covenants to reconvey the property to the grantor by a day named, on repayment of the consideration-money and the expenses of the conveyance, the transaction will be treated as a pledge of land to secure payment of a debt, and the grantor will be admitted to redeem long after the time appointed for the re-conveyance has elapsed (*h*). But if the parties intended an absolute sale, a contemporaneous agreement for a re-purchase, not acted upon, will not, of itself, entitle the vendor to treat the transaction as a pledge, and to redeem. "The question always is, was the original transaction a *bonâ fide* sale, with a contract for a re-purchase; or was it a mortgage under the form of a sale?" (*i*). Whenever a transfer of property has been made to trustees upon trusts which are, in principle and effect, to secure, by sale or other means, the repayment of money advanced, the transfer will be deemed a pledge, and the right of redemption will exist; and a contract which is once a pledge will be always so, until the right of redemption has been extinguished by foreclosure or by the statute of limitations, or has been released by a *bonâ fide* contract made subsequently to the mortgage (*k*).

The mortgagor's right to redeem cannot be clogged or extinguished by any collateral agreement entered into contemporaneously with the mortgage. If, therefore, the mortgagee enters

(*f*) *Casborne* v. *Scarfe*, 1 Atk. 605.

(*g*) *Fawcet* v. *Lowther*, 2 Ves. sen. 303; *Dixon* v. *Saville*, 1 Bro. C. C. 326.

(*h*) *Williams* v. *Owen*, 10 Sim. 386; *Sevier* v. *Greenway*, 19 Ves. 413; *Manlove* v. *Bale*, 2 Vern. 84. See also *In re Alison*, p. 604.

(*i*) *Williams* v. *Owen*, 5 Myl. & Cr. 303; *Barrell* v. *Sabine*, 1 Vern. 268.

(*k*) *Jason* v. *Eyres*, 2 Ch. C. 33; *Bell* v. *Carter*, 22 L. J. Ch. 933.

into a contract with the mortgagor at the time of the loan of the money for the absolute purchase of the lands for a specific sum in case of default made in payment of the purchase-money at an appointed time, the contract will be set aside as being oppressive to the debtor, who is rarely prepared to discharge the debt at the exact time appointed (*l*). The Courts view transactions between mortgagor and mortgagee with considerable jealousy, and will set aside the sale of the equity of redemption, where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase (*m*): and it has been said that a lease obtained by the mortgagee from the mortgagor is more objectionable than the purchase of the entire equity of redemption (*n*). But an agreement to give the mortgagee a preference of pre-emption in case of sale is valid, and will be enforced (*o*); and a *bonâ fide* purchase of the equity of redemption effected subsequently to the mortgage will be upheld (*p*). Whenever a covenant is made by the mortgagor for further assurance, the latter can only be called upon to confirm the mortgage (*q*). If an express clause of redemption is inserted in a mortgage-deed, this is not a power of revocation, or a condition, &c., for the benefit of the grantor, within the meaning of the Mortmain Acts (*r*). Any person interested in the equity of redemption is entitled to redeem, and if, being so interested, he tenders the mortgage money and interest, he is entitled to the delivery of the title deeds and to have a conveyance of the property (*s*). But the mortgagee is not bound to accept payment from a stranger who has no title to redeem (*t*). It seems that, in the case of a purchase from the owner of an equity of redemption in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice of other incumbrances is not entitled as against them to say that the incumbrances so paid off are not extinguished (*u*). But this doctrine only applies where there has been no contemporaneous expression of an intention to the contrary, and is not to be extended (*x*).

Rights of mortgagees.—Viewing the contract always as a pledge, equity recognises the mortgagee's right, as pledgee, to the possession of the mortgaged estate, and will not inter-

(*l*) *Price* v. *Perrie*, 2 Freem. 258; *Jennings* v. *Ward*, 2 Vern. 520.

(*m*) *Webb* v. *Rorke*, 2 Sch. & Lef. 661; *Ford* v. *Olden*, L. R. 3 Eq. 461.

(*n*) *Hickes* v. *Cooke*, 4 Dow. 16.

(*o*) *Orby* v. *Trigg*, 2 Eq. Ca. Abr. 599.

(*p*) 15 Vin. Abr. 468, pl. 8.

(*q*) *Atkyns* v. *Uton*, 1 Lord Raym. 36.

(*r*) *Doe* v. *Hawkins*, 2 Q. B. 212.

(*s*) *Pearce* v. *Morris*, L. R. 5 Ch. 227.

(*t*) *James* v. *Biou*, 3 Sw. 234.

(*u*) *Toulmin* v. *Steere*, 3 Mer. 210.

(*x*) *Adams* v. *Angel*, 5 Ch. D. 634, C. A.

fere with any proceedings that may be taken by him to obtain possession of the mortgaged premises; but it will not suffer him, whilst in possession, to enter into any contract inconsistent with his limited interest as pledgee, or which will in anywise prejudice or interfere with the mortgagor's right of redemption. The mortgagee cannot, consequently, before a decree of foreclosure has been pronounced, grant a lease, so as to bind the mortgagor, without the consent of the latter, except under an apparent necessity and for the purpose of avoiding an apparent loss (*y*); nor, in the case of a mortgage of a renewable lease, can he release the right to renew (*z*). And, when an advowson is the subject of mortgage, the mortgagee cannot nominate on an avoidance of the church; but the right of presentation remains vested in the mortgagor; nor can any agreement be made to the contrary, as such an agreement is inconsistent with the nature and character of a pledge (*a*). In the simple character of a pledgee of the estate, the mortgagee will be made amenable for all negligence and misconduct amounting to a breach of trust. If, therefore, he assigns his legal estate as mortgagee to a person in insolvent circumstances, he will be compelled to account for the rents and profits of the land, as well after as before the assignment (*b*). He will be bound, moreover, as pledgee of the estate, to take the same care of it as every prudent and cautious owner is in the habit of taking of his own property. He will be made responsible for waste and for all damage done to the property from pulling down buildings, unless the buildings were old and ruinous, and required removal (*c*). He will be responsible also for cutting down timber, unless the security was defective, in which case he may fell it and sell it, and apply the proceeds in liquidating the mortgage-debt and interest (*d*). When the mortgagor is left in possession of the mortgaged property, and receives the rents and profits thereof, he is not bound to render any account of such rents and profits to the mortgagee (*e*); yet equity, regarding the land as hypothecated for the mortgage-debt, will restrain the mortgagor from exercising his rights of ownership so as to deteriorate the value of the property and diminish the security of the creditor, and will, consequently, prevent him from cutting down timber, pulling down buildings, breaking up pasture land, and committing waste; and, if he fells timber, an account will be decreed, and the produce applied first

(*y*) *Hungerford* v. *Clay*, 9 Mod. 1. But see now, 44 & 45 Vict., c. 41, s. 18, *ante* p. 599.

(*z*) *O'Reilly* v. *Featherstone*, 4 Bligh, N. S. 161.

(*a*) *Mackenzie* v. *Robinson*, 3 Atk. 558; *Gardiner* v. *Griffith*, 2 P. Wms. 404.

(*b*) 1 Eq. Ca. Abr. 327.

(*c*) *Hanson* v. *Derby*, 2 Vern. 392; *Hardy* v. *Reeves*, 4 Ves. 480.

(*d*) *Witherington* v. *Banks*, Sel. C. C. 31.

(*e*) *Colman* v. *Duke of St. Albans*, 3 Ves. 26; *Ex parte Wilson*, 2 Ves. & B. 252; *Thomas* v. *Brigstocke*, 4 Russ. 64.

in payment of the interest, and then in liquidation of the principal (*f*).

Various rights and powers are given to mortgagees by the Conveyancing and Law of Property Act, 1881, ss. 19—24, as to sell, insure, appoint a receiver, cut timber in cases where the deed is made after the Act, and such powers are only conferred to the same extent as if they had been in the deed, and they may be varied by the deed, and are subject to its terms (*g*).

Of the time within which the right of redemption may be exercised.—A suit to redeem a mortgage must be brought within twenty years (now twelve years, see 37 & 38 Vict. c. 57, s. 7) next after the time at which the mortgagee obtained possession or receipt of the rents or profits of any land (*h*), unless in the meantime an acknowledgment of the title of the mortgagor, or of his right to redemption, has been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, *in writing*, signed by the mortgagee or some person claiming through him (*i*); in which case the suit must be brought within twenty (now twelve) years after the last acknowledgment. If there are several mortgagors, or several persons entitled to redeem, an acknowledgment given to one is an acknowledgment to all; but, where there are several mortgagees, or assignees of mortgagees, an acknowledgment signed by one is effectual only against the party signing it, where the latter has a divided interest in the mode pointed out in the statute. Where their interest is joint the acknowledgment of one mortgagee is wholly inoperative (*k*). If the mortgagor permits the mortgagee to hold possession of the mortgaged premises, and receive the rents thereof for twenty (now twelve) years without accounting in the character of mortgagee (*l*), and without admitting in writing the mortgagor's title, the right of redemption is barred, and the mortgagee becomes the absolute owner (*m*), and when a title is once acquired a subsequent acknowledgment will not take the case out of the statute (*n*). Where the mortgagee is also tenant for life of the mortgaged estate, the statute of limitations does not begin to run against the mortgagor's title until the death of such mortgagee (*o*). Where the plaintiff, in a

(*f*) *Farrant* v. *Lovell*, 3 Atk. 723; *Robinson* v. *Litton*, *ib.* 210.

(*g*) 44 & 45 Vict. c. 41, s. 19. As to leases by mortgagees, see *ante* p. 599.

(*h*) Possession of part of the land is sufficient, see *Kinsman* v. *Rouse*, 17 Ch. D. 104.

(*i*) 3 & 4 Will. 4, c. 27, s. 28. This section is now repealed; see 37 & 38 Vict. c. 57, s. 9; and s. 7 of that Act is substituted. As to the acknowledgment in writing, see *Lucas* v. *Dennison*, 13 Sim. 584; *Hansard* v. *Hardy*, 18 Ves. 455; *Stansfield* v. *Hobson*, 22 L. J. Ch. 657.

(*k*) *Richardson* v. *Younge*, L. R. 10 Eq. 275; *ib.* 6 Ch. 478; 39 L. J. Ch. 475; 40 *ib.* 338.

(*l*) *Baker* v. *Wetton*, 14 Sim. 426; *Barron* v. *Martin*, 19 Ves. 327.

(*m*) *Raffety* v. *King*, 1 Keen, 601; *In re Alison*, 11 Ch. D. 284.

(*n*) *In re Alison*, *supra*; *Sanders* v. *Sanders*, 19 Ch. D. 373.

(*o*) *Wynne* v. *Styan*, 2 Ph. 303; *Pears* v. *Laing*, L. R. 12 Eq. 41; 40 L. J. Ch. 225.

suit of redemption, did not pay the principal and interest at the time appointed by the court, he was not allowed to redeem, although before the motion to dismiss was made he had tendered the amount reported to be due with the subsequent interest (*p*). A mortgagee has no right to show the title of his mortgagor, and cannot be compelled to state the contents of his title-deeds (*q*); and he is not bound to produce his mortgage-deed to the devisee of the mortgaged estate until payment of principal and interest (*r*).

Of the accounts to be taken.—In taking an account of the amount of the mortgage-debt, interest, and costs, the amount of the rents and profits received by the mortgagee, deducting expenses, will be set off against the interest and costs (*s*). The mortgagee is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much, unless it can be shown that he might have made so much of it but for his own wilful default (*t*). The general rule is, that he is only accountable for what he receives, and is not bound to take any particular trouble to make the most of another man's property. He is, however, accountable not merely for his own actual receipts whilst in possession, but also for the receipts of those to whom he may have transferred possession under an arrangement inoperative to transfer title, and in derogation of the rights of the mortgagor (*u*). Where a mortgagee has entered upon default of payment, he may, on accounts being taken, charge the higher rate of interest fixed by the deed, and not the lower one chargeable upon punctual payment (*x*). The court will not direct the master to fix, and charge the mortgagee with, an occupation rent, unless the plaintiff alleges and shows, not only that the mortgagee has been in possession of the mortgaged estate, and in receipt of the rents and profits thereof, but also that he has resided on and been in the occupation of the property, or of part of it (*y*). The mortgagee may have interest upon interest if confirmed by the mortgagor (*z*). He will be allowed, also, the necessary expenses attending the collection of the rents, and the costs of a receiver where a receiver is necessary (*a*); but he cannot

(*p*) *Faulkner* v. *Bolton*, 7 Sim. 319; *Novosielski* v. *Wakefield*, 17 Ves. 417.

(*q*) *Lambert* v. *Rogers*, 2 Mer. 489; *Addison* v. *Walker*, 4 You. & C. 447.

(*r*) *Browne* v. *Lockhart*, 10 Sim. 421.

(*s*) Though until an account be taken the mortgagee in possession is not bound to appropriate rents received to interest, *Cockburn* v. *Edwards*, 18 Ch. D. 449.

(*t*) *Parkinson* v. *Hanbury*, L. R. 2 H. L. 1; *National Bank of Australasia* v. *United Hand in Hand Co.*, 4 Ap. Cas. 392.

(*u*) *National Bank of Australasia*, v. *United Hand in Hand Co.*, 4 Ap. Cas. 392.

(*x*) *Union Bank of London* v. *Ingram*, 16 Ch. D. 53.

(*y*) *Trulock* v. *Robey*, 15 Sim. 265.

(*z*) *Blackburn* v. *Warwick*, 2 Y. & C. 92.

(*a*) *Davis* v. *Denby*, 3 Mad. 170; *Langstaffe* v. *Fenwick*, 10 Ves. 405; *Union Bank of London* v. *Ingram*, 16 Ch. D. 53; see also the 44 & 45 Vict. c. 41, s. 24.

charge for his personal trouble, although there may be an express agreement that he shall be entitled to do so (*b*). In the case of a mortgage of a mine or quarry, the mortgagee will be entitled to all fair and reasonable expenses incurred in working the mine and rendering it productive; but he must not indulge in rash speculations (*c*). And he has no right to charge upon the mortgagor the costs and expenses of unnecessary improvements, and is not permitted to increase the value of the estate in such a way as to make it impossible for the mortgagor, with his limited means, ever to redeem. This is what has been termed improving a mortgagor out of his estate (*d*). But he will be entitled to charge all fair, customary, and necessary expenses in renewing leases, and in necessary repairs and moderate improvements (*e*). So the mortgagees of a ship were held entitled to "just allowances" in taking and holding possession of the ship, advertising it for sale, and effecting insurances (*f*). So they are entitled to necessary repairs under the head of "just allowances," but not to permanent improvements or substantial repairs (*g*). If, in taking the accounts, the mortgagor proves the estate to have been let at a certain rent at any time during the mortgagee's possession, the *onus* will be thrown on the mortgagee to show that such was not the rent during the whole period of his possession (*h*). If no interest is in arrear when the mortgagee takes possession, or the rents considerably exceed the interest, annual rests of rents received will be ordered to be taken (*i*); but the court does not in general direct annual rests, if there were arrears of interest at the time the mortgagee possessed himself of the mortgaged premises; and, if a mortgagee is not liable to account with annual rests when he enters into possession, he does not become so liable until the whole of the mortgage-debt has been paid off. But, where a mortgagee in possession came to an account with the mortgagor, whereby all the arrears of interest, &c., were converted into principal, leaving thereby no arrears, and he continued in possession, the rent being more than sufficient to keep down the interest, the court decreed annual rests (*k*). In taking the account the mortgagor is entitled to the benefit of set-off (*l*). If the mortgagor has given notice of his intention to pay off the mortgage by a given day, and the payment of the money and the redemption of the estate are postponed by reason of the mortgagee's having lost some of the

(*b*) *French* v. *Baron*, 2 Atk. 120.
(*c*) *Rowe* v. *Wood*, 2 Jac. & Walk. 553.
(*d*) *Sandon* v. *Hooper*, 6 Beav. 246.
(*e*) *Scholefield* v. *Lockwood*, 33 L. J. Ch. 106.
(*f*) *Wilkes* v. *Saunion*, 7 Ch. D. 188.
(*g*) *Tipton Green Co.* v. *Tipton Moat Co.*, 7 Ch. D. 192.
(*h*) *Blacklock* v. *Barnes*, Sel. C. C. 53.
(*i*) *Shephard* v. *Elliott*, 4 Mad. 254; *Gould* v. *Tancred*, 2 Atk. 533.
(*k*) *Wilson* v. *Cluer*, 3 Beav. 136; *Finch* v. *Brown*, *ib.* 70.
(*l*) *Agra and Masterman's Bank, Ex parte Anderson*, 36 L. J. Ch. 73.

title-deeds, the mortgagor will not be bound to pay interest after the day on which he was ready to pay off the principal. The mortgagee, moreover, must indemnify the mortgagor against the consequences of the loss of the deeds (*m*). The party seeking to redeem has, in general, to pay the costs of the suit; but, when the mortgage-debt, interest, and costs, have been tendered prior to the filing of the bill, and the mortgagee has put forward unjust and unfounded claims, and has refused to re-convey, except on payment of money which he had no right to demand, the court has thrown the burthen of the costs upon him (*n*).

Registration of mortgages.—Mortgages of lands in the counties of Middlesex and Yorkshire, and equitable charges thereon, must be registered (*o*). A memorandum of further charge in favour of the first mortgagee requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such further charge (*p*). By the Land Transfer Act, 1875 (*q*), provisions are made for the registration of mortgages on land registered under that Act, and for the transfer (*r*) and transmission on death, bankruptcy, or marriage (*s*), and by the Conveyancing and Law of Property Act as to the devolution of trust and mortgage estates upon death (*t*).

Re-conveyance of the estate.—If the mortgage-money is not paid at the time appointed, the legal estate granted is, as we have before seen, discharged of the condition, and becomes absolutely vested in the mortgagee. If, at a subsequent period, the mortgagee receives the mortgage-money pursuant to any previous parol agreement to enlarge the time of payment, or of his own free will, the legal estate is not re-vested in the mortgagor, but remains the property of the mortgagee until it has been re-conveyed by deed. But, whenever the mortgage-money and interest have been paid back and received by the mortgagee, or the mortgagor has tendered, or is ready and offers to pay, it with costs, the court will compel the mortgagee to receive it and execute a re-conveyance of the estate, so long as the mortgagor's right to redeem has not been foreclosed, or extinguished by effluxion of time (*u*). When a

(*m*) *Midleton* v. *Eliot*, 11 Jur. 742, V. C. E.

(*n*) *Morley* v. *Bridges*, 2 Col. C. C. 621; *Montgomery* v. *Calland*, 14 Sim. 79; *Roberts* v. *Williams*, 4 Hare, 129; see also *National Bank of Australasia* v. *United Hand in Hand Co.*, 4 Ap. Cas. 391.

(*o*) *Moore* v. *Culverhouse*, 27 Beav. 639; 29 L. J. Ch. 419; *Neve* v. *Pennell*, 2 H. & M. 170; 33 L. J. Ch. 19; *In re Wight's Mortgage Trust*, L. R. 16 Eq. 41.

(*p*) *Credland* v. *Potter*, L. R. 18 Eq. 350, 10 Ch. 8.

(*q*) 38 & 39 Vict. c. 87, ss. 22—28.

(*r*) S. 40.

(*s*) Ss. 41—47, s. 87.

(*t*) 44 & 45 Vict. c. 41, s. 30, repealing s. 48 of Land Transfer Act.

(*u*) *Walker* v. *Jones*, L. R. 1 P. C. 50; 35 L. J. C. P. 30; *Oxford and Canterbury Hall Co., In re*, L. R. 5 Ch. 433; 39 L. J. Ch. 775.

particular time is fixed for the repayment of the money advanced and the re-transfer of the property to the mortgagor, the mortgagee cannot be compelled to receive the money and relinquish the property, or to re-convey it, before the appointed period (*x*). After the mortgagor has made default in payment of the mortgage-debt at the time appointed, he must give six calendar months' notice to the mortgagee of his intention to pay off the mortgage.

By the Conveyancing and Law of Property Act, 1881, the mortgagor may require the mortgagee, instead of re-conveying, to assign the mortgage-debt and convey the property to a third person, but this does not apply to a mortgagee in possession, or who has been in possession (*y*).

Foreclosure and sale.—The mortgagee, on non-payment of the mortgage-debt at the time appointed, may claim a foreclosure of the equity of redemption, and the Court, without allowing any time for redemption, may, if it thinks fit, direct a sale on such terms as it thinks fit at any time before foreclosure absolute (*z*). Until the mortgagee is actually paid off by his own consent, or by decree of the court, he retains the character of mortgagee, with all the rights incident thereto, and it was held that he might therefore claim a foreclosure, notwithstanding a notice by the mortgagor to pay off the mortgage, and even notwithstanding a decree for redemption (*a*).

Before a decree for foreclosure can be obtained, all parties entitled to the mortgage-money must be brought before the court, and be made parties to the proceedings (*b*). When a mortgage is paid off, the mortgagee becomes a trustee of the title-deeds for the mortgagor, and is answerable to the latter for the loss of the deeds (*c*). A decree for foreclosing the right of redemption of an infant must give the infant a day to show cause against the decree after he attains twenty-one (*d*). Although it has been said that a foreclosure only seeks the exclusion of an equity, yet it is, in substance, a suit for the recovery of money. The statute of limitations, therefore, may be pleaded to a claim of foreclosure (*e*). If, after a claim for foreclosure has been brought by a mortgagee in

(*x*) *Brown* v. *Cole*, 14 L. J. Ch. 167.

(*y*) 44 & 45 Vict. c. 41, s. 15. See Coote on Mort., 4th ed., 655, 741. The section applies to mortgages before and after the Act, and notwithstanding any stipulation to the contrary. The consent of the *puisne* mortgagee must be obtained, see *Teevan* v. *Smith*, 20 Ch. D. 724.

(*z*) 44 & 45 Vict. c. 41, s. 25; *Union Bank of London* v. *Ingram*, 20 Ch. D. 463; *Wooley* v. *Colman*, 21 Ch. D. 169; *Jenkin* v. *Row*, 5 De G. & S. 107; 7 Geo. 2, c. 20; *Lushington* v. *Price*, 9 Sim. 651.

(*a*) *Grugeon* v. *Gerrard*, 4 Y. & C. 119.

(*b*) *Palmer* v. *Carlisle*, (*Earl of*), 1 Sim. & Stu. 423.

(*c*) *Brown* v. *Sewell*, 22 L. J. Ch. 1063; *Hornby* v. *Matcham*, 16 Sim. 327.

(*d*) *Price* v. *Carver*, 3 Mylne & C. 157.

(*e*) *Dearman* v. *Wyche*, 9 Sim. 570; but see Lord St. Leonards' Practical Treatise on the New Statutes relating to Property, 2nd ed. p. 139, s. 51.

possession praying a sale, it is found that the rents and profits received by him were sufficient to satisfy the mortgage-debt, and that nothing was due to the mortgagee at the commencement of the action, he will be ordered to pay all the costs, including those of the reference and the taking of the accounts (*f*); and, if the mortgagee, after the commencement of his action, assigns over his mortgage, he will have to pay all the costs thereby rendered necessary to bring his assignee before the court (*g*). The court might direct a sale instead of a foreclosure under the 15 & 16 Vict. c. 86, s. 48, without the consent of the mortgagor (*h*). See now Conveyancing and Law of Property Act, ss. 19—25.

Enlargement of the time for payment.—The time appointed by the decree for payment of the mortgage-debt will be enlarged by the court, even after the decree has been made, and the mortgagee has been in possession for many years under it, if any fair and reasonable ground can be shown for the proceeding; and unfair conduct in obtaining the decree will itself open the decree (*i*). When the time for payment is enlarged, all subsequent interest will be computed on the aggregate sum found due for principal, interest, and costs (*k*). If the mortgagee has received rents between the date of the master's report and the day appointed for the payment, the court will refer the report back to the master to continue the accounts and appoint a new day for payment (*l*). When the mortgagor has brought his action to redeem, and a day has been appointed for payment, the court will not in general enlarge the time (*m*).

Of the different remedies of the mortgagee.—Where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor becomes entitled to the estate; but, if he obtains part payment only, he may go on with a claim for foreclosure, and foreclose for the remainder. On the other hand, if he forecloses in the first instance, and the value of the estate proves insufficient to satisfy the debt, he may, while the mortgaged estate remains in his power, sue on the bond or covenant; but in so doing he opens the foreclosure, and the mortgagor thereupon becomes entitled to redeem. If, after foreclosure, he sells the estate, and realizes less than what is due to him, he cannot bring an action after such sale, and after he has disabled himself from restoring the estate, to recover from the mortgagor,

(*f*) *Binnington* v. *Harwood*, 1 Turn. & Russ. 477.

(*g*) *Barry* v. *Wrey*, 3 Russ. 465. As to foreclosure of separate mortgages and foreclosure by claim, see *Smeathman* v. *Bray*, 15 Jur. 1051.

(*h*) *Newman* v. *Selfe*, 33 Beav. 522; 33 L. J. Ch. 527.

(*i*) *Eyre* v. *Hanson*, 2 Beav. 478; *Jones* v. *Creswicke*, 9 Sim. 304; *Cocker* v. *Bevis*, 1 Ch. C. 61.

(*k*) *Bruere* v. *Wharton*, 7 Sim. 483.

(*l*) *Ellis* v. *Griffiths*, 7 Beav. 83.

(*m*) *Novosielski* v. *Wakefield*, 17 Ves. 417.

upon the collateral personal securities, the difference between the price realized on the sale and the original mortgage debt (*n*). Nor can he sue on collateral securities unless he is in a condition to reconvey the estate (*o*). In an action for redemption alone, or for sale alone, judgment may be obtained now for redemption or sale (*oo*).

Powers of sale (*p*).—A mortgagee, having an absolute power of sale on failure of payment of the mortgage-debt and interest, must act *bonâ fide* in the conduct of a sale; but the Court will not interfere merely because the sale is disadvantageous (*q*). A power given to a trustee in a mortgage-deed, to sell on the request of the mortgagor, does not necessarily convey to the trustee a right to enter upon the mortgaged premises (*r*). Where there are several mortgages of several estates to the same mortgagee for distinct debts, the proceeds of the sale of each estate must be applied solely in liquidation of the particular debt charged thereon, so that the surplus from one estate cannot be applied to make good the deficiency of another estate (*s*). There is nothing to prevent a puisne mortgagee from purchasing the mortgaged property upon the exercise by a prior mortgagee of his power of sale; and, if he does so purchase, he will acquire an absolute, irredeemable title as against the mortgagor (*t*). First and second mortgagees may join in selling; and each may give a separate receipt for his portion of the purchase-money to the purchaser (*u*).

Insurance against fire by the mortgagee.—By the Conveyancing and Law of Property Act, 1881, power to insure is given to the mortgagee (*x*), provision is made for limiting the amount of insurance money to that named in the deed, or if not named then two-thirds of the total loss (*y*), and for application of the money at the mortgagee's request by the mortgagor in making good the loss (*z*), or without prejudice to any agreement to the contrary in discharging the money due under the mortgage (*a*).

Of the tacking of arrears of interest and incumbrances.—Upon the principle that he who seeks equity shall do equity, the court will not enable a mortgagor to redeem his estate, except upon the terms that he pays all arrears of interest for payment of which he is personally liable, whether the arrears do or do not

(*n*) *Lockhart* v. *Hardy*, 9 Beav. 349; *Burnell* v. *Martin*, 2 Doug. 417.

(*o*) *Walker* v. *Jones*, L. R. 1 P. C. 50; 35 L. J. P. C. 30; *Burrell* v. *Smith*, L. R. 7 Eq. 399; 38 L. J. Ch. 382.

(*oo*) See 44 & 45 Vict. c. 41, s. 25.

(*p*) See the 44 & 45 Vict. c. 41, ss. 19—22.

(*q*) *Jones* v. *Matthie*, 11 Jur. 504; *Kirkwood* v. *Thompson*, 2 De G. J. & S. 613; *Marriott* v. *Anchor Reversionary Company*, 30 L. J. Ch. 122, 571; *Warner* v. *Jacob*, 20 Ch. D. 220.

(*r*) *Watson* v. *Waltham*, 2 Ad. & E. 485.

(*s*) *Ex parte Bignold*, 2 Deac. 66.

(*t*) *Shaw* v. *Burney*, 34 L. J. Ch. 257; 33 Beav. 494.

(*u*) *M'Carogher* v. *Whieldon*, 34 Beav. 107.

(*x*) 44 & 45 Vict. c. 41, sect. 19 (i), (ii).

(*y*) Sect. 23 (1), where there is no insurance required, or the mortgagor insures, the Act does not apply.'

(*z*) Sect. 23 (3).

(*a*) Sect. 23 (4).

constitute a charge upon the mortgaged premises (*b*), and also all the costs and expenses necessarily incurred by the mortgagee in maintaining the title to the estate, and in repairing and preserving the mortgaged property, and all debts due to him from the mortgagor in respect of which he has a lien upon the land sought to be redeemed (*c*). If, therefore, the mortgagee has advanced money to the mortgagor beyond the amount secured by the mortgage, expressly by way of further charge on the mortgaged premises, or on a judgment, statute, or recognizance, these subsequent advances must be repaid before the court will order the mortgagee to re-convey the estate. But, if there is no lien on the land in respect of such subsequent advances, a re-conveyance will be ordered independently of them (*d*). A bond or simple contract debt cannot be tacked on to a mortgage as against the mortgagor himself; but it may as against the heir or beneficial devisee, or the executor of a mortgagor for a term of years, coming to redeem (*e*), unless there be a devise for payment of debts, in which case the mortgagee must come in upon the bond rateably with the other creditors (*f*). No bond or simple contract debt can be tacked on to the mortgage as against mesne incumbrancers having a lien upon the land (*g*), nor as against the assignee or mortgagee of the equity of redemption, or creditors, or purchasers for a valuable consideration (*h*). As he who seeks equity must do equity, the court will not, where two estates have been severally mortgaged between the same parties to secure the repayment of several debts, and the title to one estate proves defective, enable the mortgagor or his assignee (*i*) to redeem one mortgage without paying off both (*k*). But where one of the mortgaged properties has ceased to exist (as where a lease has been forfeited by bankruptcy) the two debts cannot be consolidated so as to prevent one property being separately redeemed (*l*). The right of a mortgagee to unite two securities from the same mortgagor exists equally in foreclosure and redemption suits (*m*). Consolidation only applies where there has been default on all the securities

(*b*) *Elvy* v. *Norwood*, 21 L. J. Ch. 716; 5 De G. & S. 240.

(*c*) *South* v. *Bloxam*, 2 H. & M. 457; 34 L. J. Ch. 369.

(*d*) *Baker* v. *Harris*, 16 Ves. 397. As to discharge of liens, see 44 & 45 Vict. c. 41, s. 17.

(*e*) *Challis* v. *Casborn*, Pre. Ch. 407; *Morret* v. *Paske*, 2 Atk. 53; *Archer* v. *Snatt*, 2 Str. 1107; *Coleman* v. *Winch*, 1 P. Wms. 775.

(*f*) *Hearns* v. *Bance*, 3 Atk. 630; *Price* v. *Fastnedge*, Amb. 685.

(*g*) *Lowthian* v. *Hasel*, 3 Bro. C. C. 162.

(*h*) *Anon.*, 2 Ves. sen. 662; *Adams* v. *Claxton*, 6 Ves. 225.

(*i*) *Beevor* v. *Luck*, L. R. 4 Eq. 537; 36 L. J. Ch. 865; but see *Cummings* v. *Fletcher*, *infra*, and *Harter* v. *Colman*, 19 Ch. 630.

(*k*) *Jones* v. *Smith*, 2 Ves. jun. 376; *Roe* v. *Soley*, 2 W. Bl. 725. See *post*, p. 613, Tacking and Consolidation.

(*l*) *In re Raggett*, 16 Ch. D. 117.

(*m*) *Selby* v. *Pomfret*, 1 Johns. & H. 336; 30 L. J. Ch. 770; but see this case commented on in *Cummings* v. *Fletcher*, *infra*; *Jennings* v. *Jordan*, 6 Ap. Cas. 698.

sought to be consolidated (*n*). A mortgage for an individual debt cannot be consolidated with one for a partnership debt (*o*).

Priority of incumbrances and mortgages.—If the mortgagee neglects to ask for the title-deeds of the mortgaged property, and to secure the possession of them, he will take his mortgage subject to any lien which the holder of the deeds may be able to establish on the estate (*p*). If a party, having knowledge of a deposit of title-deeds, avoids making any inquiry into the circumstances under which the deposit was made, and does not require the deeds to be delivered up to him, his claim as mortgagee will be postponed to that of the depository of the deeds (*q*). Where the creditor of a London publican took from the latter a mortgage as a security for an antecedent debt, knowing at the time that the publican was indebted to his brewers, and that it was the ordinary practice of London publicans to deposit their leases with their brewers as a security for debts due to them, and made no inquiry upon the subject, and the publican's lease had, in fact, been deposited with the brewers as a security for the balance of their account for beer, it was held that the lien of the brewers had priority over the claim upon the mortgage (*r*); but a first mortgagee, omitting to ask for or parting with the title-deeds, will not on that account be postponed to a subsequent incumbrancer, with whom the deeds have been deposited, without notice of the prior charge, unless in his conduct there appears to be such negligence as amounts to fraud (*s*). Where, however, the mortgagee of leasehold property lent the lease to the mortgagor, for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he borrowed the money of the mortgage, and the mortgagor borrowed the money from his bankers upon the security of a deposit of the lease, without giving them notice of the mortgage, it was held that the mortgage must be postponed to the bankers' lien (*t*). Equitable incumbrances and charges upon the mortgaged property of which the mortgagee had actual or constructive notice at the time he effected the mortgage will have priority over him according to their respective dates (*u*);

(*n*) *Cummings* v. *Fletcher*, 14 Ch. D. 699. See *post*, p. 613, Tacking and Consolidation; and p. 614, Conveyancing and Law of Property Act.

(*o*) *Per* James, L. J., in *Cummings* v. *Fletcher*, *supra*.

(*p*) *Worthington* v. *Morgan*, 18 L. J. Ch. 233; *Perry-Herrick* v. *Attwood*, 2 De G. & J. 21; 27 L. J. Ch. 121.

(*q*) *Birch* v. *Ellames*, 2 Anstr. 427.

(*r*) *Whitbread* v. *Jordan*, 1 You. & C. 303; *Hewitt* v. *Loosemore*, 9 Hare, 449; 21 L. J. Ch. 69.

(*s*) *Dowle* v. *Saunders*, 2 H. & M. 242; 34 L. J. Ch. 87; *Hunt* v. *Elmes*, 2 De G. F. & J. 578; 30 L. J. Ch. 255; *Layard* v. *Maud*, L. R. 4 Eq. 397; 36 L. J. Ch. 669, must not be taken as an authority to the contrary, see *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139.

(*t*) *Briggs* v. *Jones*, L. R. 10 Eq. 92.

(*u*) *Beckett* v. *Cordley*, 1 Bro. C. C. 353; *Wilmot* v. *Pike*, 5 Hare, 14; *Wormald* v. *Maitland*, 35 L. J. Ch. 69; as to this last case, see however *Agra Bank* v. *Berry*, L. R. 7 H. L. 135; and *Spencer* v. *Clarke*, 9 Ch. D. 137.

and, when any party, having knowledge of such facts as would lead any person using ordinary caution to make further inquiries, studiously avoids making any inquiry at all, he must be taken to have notice of those facts which, if inquired into, would have been readily ascertained; for such negligence might otherwise be readily made a cloak for fraud. If a party appears to have had even a suspicion of the truth, and then makes no inquiry, his conduct is strong evidence of *mala fides* (*x*). Whenever a mortgagee has actual or constructive notice of an existing equitable incumbrance at the time he accepts the mortgage, he will not be permitted to avail himself of an assignment of an outstanding term prior to both, in order to obtain a priority over such equitable incumbrance (*y*). As between equitable incumbrancers relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect of his, and that relief will not be refused as against a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice (*z*).

Tacking and consolidation.—Where several mortgages have been executed of the same property, they will, as a general rule, have priority according to date; but a third mortgagee buying in the first mortgage may unite his securities and postpone the second mortgagee, provided he had no notice of the second mortgage at the time he lent his money on the third mortgage; and this Hale, C.J., called "a plank gained by the third mortgagee, *tabula in naufragio*" (*a*). And this right is not affected by the fact that the second mortgagee is really prior in point of date, and is merely postponed by the operation of the registry Acts, nor by the circumstance that the incumbrance, in respect whereof the right to consolidate is claimed, is equitable merely, and that the second mortgagee had no notice thereof (*b*). But a prior mortgagee who has an assignment of a third mortgage as a trustee only cannot tack the two mortgages together to the prejudice of intervening incumbrancers (*c*); nor are the priorities of successive incumbrancers altered by one of them getting in the legal estate from one who is a trustee for them all (*d*), or from a trustee with notice of the trust (*e*). A second mortgagee who obtains an assignment of a term to attend the

(*x*) *Jones* v. *Smith*, 1 Hare, 43; *Spencer* v. *Clarke*, *supra*.

(*y*) *Willoughby* v. *Willoughby*, 1 T. R. 763; *Allen* v. *Knight*, 15 L. J. Ch. 430.

(*z*) *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139.

(*a*) *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Robinson* v. *Davison*, 1 Bro. C. C. 63; *Belchier* v. *Butler*, 1 Eden, 523; *Hopkinson* v. *Rolt*, 9 H. L. C. 514; 34 L. J. Ch. 468; *London & County Banking Co.* v. *Ratcliffe*, 6 Ap. Cas. 722.

(*b*) *Neve* v. *Pennell*, 2 H. & M. 170.

(*c*) *Morret* v. *Paske*, 2 Atk. 52.

(*d*) *Sharples* v. *Adams*, 32 Beav. 213.

(*e*) *Saunders* v. *Dehew*, 2 Vern. 271; *Harpham* v. *Shacklock*, 19 Ch. D. 207.

inheritance, and has all the title-deeds, may recover in ejectment against the first mortgagee, if he had no notice of the first mortgage at the time he lent his money; for the first mortgagee, by leaving the title-deeds in the hands of the mortgagor, enabled the latter to commit a fraud (*f*). And all mesne incumbrancers who take protection against subsequent incumbrancers have a better equity than the prior incumbrancers who have neglected to take such protection, and are consequently entitled to priority, provided their advances have been made without notice of any prior charge. Therefore a second incumbrancer of an equitable interest who gives notice to the trustees in whom the legal estate is vested, obtains priority over a previous incumbrancer who has not given such notice (*g*). A first mortgagee for present and future advances is not, as against a second mortgagee, entitled to priority in respect of advances made by him after notice of the second mortgage (*h*). Blackacre was mortgaged to A., and then mortgaged to other persons with notice to A. B. paid off A. by agreement knowing of the subsequent mortgages. Whiteacre was mortgaged to B. by the same owner. A. transferred the mortgage of Blackacre to B., the owner joining. It was held that B. could not consolidate his mortgage of Whiteacre with the mortgage of Blackacre as against the subsequent mortgagees of Blackacre, and that the doctrine of consolidation could not be so far extended (*i*). The grantee of a bill of sale cannot tack a prior mortgage of other property, and so claim the surplus goods after the bill of sale is satisfied so as to defeat the right of an execution creditor to such surplus (*k*).

By the Conveyancing and Law of Property Act, 1881; a mortgagor may redeem one mortgage without paying any money due under his separate mortgage on other property unless a contrary intention is expressed in either mortgage deed (*l*).

Every priority may be lost by fraud.—If, therefore, a creditor, who has a mortgage or lien on the estate of his debtor, fraudulently conceals the fact, and thereby enables such debtor to perpetrate a fraud upon a subsequent mortgagee, his claim will be postponed to the claim of the latter under such second mortgage (*m*). The want of possession of title deeds by a first mortgagee leads to a *primâ*

(*f*) *Goodtitle* v. *Morgan*, 1 T. R. 755.

(*g*) *Foster* v. *Blackstone*, 1 Mylne & K. 297; *S. C. Foster* v. *Cockerell*, 3 Cl. & Fin. 456; *Timson* v. *Ramsbottom*, 2 Keen, 35.

(*h*) *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514; 34 L. J. Ch. 468; *Menzies* v. *Lightfoot*, L. R. 11 Eq. 459.

(*i*) *Baker* v. *Gray*, 1 Ch. D. 491; see *Mills* v. *Jennings*, 13 Ch. D. 639; in H. of L., *Jennings* v. *Jordan*, 6 Ap. Cases, 698.

(*k*) *Chesworth* v. *Hunt*, 5 C. P. D. 266.

(*l*) 44 & 45 Vict. c. 41, s. 17; the section only applies where one or both of the deeds were made after the commencement of the Act.

(*m*) *Ibbotson* v. *Rhodes*, 2 Vern. 554; *ib.* 151, 370; *Berrisford* v. *Milward*, 2 Atk. 49.

facie presumption of fraud, and will cause such first mortgagee so without the deeds to be postponed to a second mortgagee in possession of the deeds, unless the first mortgagee has been defrauded of the deeds or has been deceived by his own solicitor, and the presumption of collusion or of gross negligence in failing to seek for and obtain possession of the deeds can be rebutted (*n*). But, when the Court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds, he is not bound to examine the deeds, nor is he bound by constructive notice of their actual contents, or of any deficiencies which by examination he might have discovered in them (*o*).

After a decree to settle priorities, there can be no tacking of subsequent debts and incumbrances to prior securities (*p*). The second mortgagee is entitled to pay off, and to have a conveyance of the mortgaged estate from, the first mortgagee; and the latter ought, without the compulsion of judicial proceedings, to accept payment from the second mortgagee, and convey the mortgaged estate to him, whether the mortgagor does or does not consent thereto. Where, therefore, a first mortgagee, after receipt of the usual notice by a second mortgagee of the intention of the latter to pay off the mortgage, filed a bill of foreclosure, and the second mortgagee tendered the mortgage-money and costs to the first mortgagee, and the latter declined to accept it, it was held that the first mortgagee was not entitled to the costs of the suit for foreclosure after the tender (*q*). But it must be clearly shown that the whole amount which the first mortgagee is entitled to charge upon the land is tendered to him (*r*). After a first mortgage has been paid off, the second mortgagee may file a bill to have the legal estate conveyed to him without praying to foreclose the mortgage; and he may, it seems, do this at the peril of costs until the day of payment under a decree for redemption obtained against him by the mortgagor (*s*). Upon a question of priority of incumbrances on shares, notice to one or more members of a joint-stock company individually is not notice to the company at large (*t*).

Where the owner of land deposits his title-deeds with a creditor as a security for the payment of a debt, the creditor has in

(*n*) *Evans* v. *Bicknell*, 6 Ves. junr. 183; *Martinez* v. *Cooper*, 2 Russ. 198; *Hunt* v. *Elmes*, 2 De G. F. & J. 578; 30 L. J. Ch. 255; *Dowle* v. *Saunders*, 34 L. J. Ch. 87.

(*o*) *Dixon* v. *Muckleston*, L. R. 8 Ch. 155.

(*p*) *Ex parte Knott*, 11 Ves. 619.

(*q*) *Smith* v. *Green*, 1 Col. Ch. C. 555.

(*r*) *Williams* v. *Owen*, 13 Sim. 597; this case was not followed in *Forbes* v. *Jackson*, 19 Ch. D. 615, in so far as it decides that the mortgage cannot be redeemed without paying other sums lent by the mortgagee charged upon the premises.

(*s*) *Grugeon* v. *Gerrard*, 4 Y. & C. 119.

(*t*) *Martin* v. *Sedgewick*, 9 Beav. 333.

equity a claim or charge upon the estate, which will bind the land in the hands of all subsequent purchasers who had notice of the deposit at the time they accepted a conveyance of the property, and will prevail over the claims of all prior unexecuted or subsequent judgment creditors (*u*), and of the trustee of a bankrupt depositor (*x*). The depositary of the title-deeds has a direct control over the owner's power of disposition of the estate, inasmuch as a purchaser cannot safely take a conveyance without a previous investigation of the title; and, if the latter receives notice of the deposit of the deeds before he has completed his purchase, the land will be subjected in his hands to all the claims and charges which the depositary of the deeds may have acquired thereon (*y*). If, however, a subsequent purchaser or mortgagee has been deceived by false evidence of title, such as the production of forged or counterfeit title-deeds, and has not been guilty of any laches or negligence in the course of his purchase or acquisition of the property, he will be entitled to hold it discharged of the lien (*z*). In such a case, the equities of the parties being equal, the possessor of the legal title must prevail. So, if the depositary of the deeds makes himself in any way a party to the concealment of the deposit from the subsequent purchaser or mortgagee, he will lose his lien upon the land as soon as a transfer or conveyance has been executed to the latter. If he is induced to part with the possession of the deeds, and they are then taken without his knowledge or authority, and produced as evidence of title to an intended purchaser, who accepts a conveyance and pays his purchase-money in ignorance of the deposit, the land will pass free from the charge (*a*). But the depositary will not, from the mere circumstance of his having parted with the possession of the deeds, and without their having been made the instrument of fraud, lose his charge or lien upon the land therein comprised (*b*). If the property comprised in the title-deeds is subject to a trust, the trust will prevail as against the depositary, although he had no notice of the trust at the time of the making of the deposit (*c*). A lien may be created on the estate and interest of the depositor by the deposit of a land certificate granted in conformity with the 25 & 26 Vict. c. 53 (*d*).

Authentication of the deposit as a charge on realty.—In order to constitute and create a charge or lien of this description upon the land, there must be an actual or constructive deposit of the title-deeds (*e*); an agreement to make a deposit will not have the

(*u*) *Whitworth* v. *Gaugain*, 3 Hare, 416; 27 & 28 Vict. c. 112.

(*x*) *Sumpter* v. *Cooper*, 2 B. & Ad. 223; *Doe* v. *Jones*, 10 B. & C. 718.

(*y*) *Hiern* v. *Mill*, 13 Ves. 114; *Birch* v. *Ellames*, 2 Anstr. 427; *Dryden* v. *Frost*, 3 My. & Cr. 670.

(*z*) *Plumb* v. *Fluit*, 2 Anstr. 432.

(*a*) *Allen* v. *Knight*, 5 Hare, 278.

(*b*) *Ex parte Morgan*, 12 Ves. 6.

(*c*) *Manningford* v. *Toleman*, 1 Col. C. C. 670.

(*d*) See sect. 73.

(*e*) *Ex parte Coombe*, 4 Mad. 249; *Ex*

effect of charging the land with the payment of the debt. But it is not necessary that there should be a written memorandum of the nature and terms of the deposit (*f*). If money is advanced on the one side, and the deeds are deposited on the other, or the depositor is shown to have been indebted to the depositary at the time of the making of the deposit, it is sufficient to constitute and create the charge or lien upon the land (*g*). But the mere production of title-deeds from the possession of a bond creditor is not of itself sufficient evidence of a lien (*h*). A charge upon copyholds may be created by "a mere deposit by a debtor of the copy of court roll with his creditor," as a security for the payment of the debt (*i*). An actual charge or lien by deposit of title-deeds is not within the Statute of Frauds (*k*); but it is otherwise with an agreement to make a deposit, which is not binding unless it is in writing (*l*). An oral agreement to mortgage lands as a security for the payment of an existing debt, followed by a deposit of title-deeds, has been held to have the effect of hypothecating or charging the lands held under such deeds (*m*). Title-deeds originally deposited in the hands of bankers for safe custody may, by a subsequent agreement with them, be changed into a deposit to secure the re-payment of money advanced (*n*); and, if changes take place in the members of the banking firm, they will not, by reason thereof, lose the benefit of their security (*o*). Where some brewers agreed to advance money to a publican on a deposit of his lease, and the lease was delivered by the lessor, immediately after its execution, to the brewers' agent, who advanced the money, it was held that the brewers had a lien on the lease (*p*). Lastly, it may be observed that, although a written contract is held not to be necessary to establish the charge or lien upon the land, yet, if the depositary can produce no written evidence of the contract, he will not in general be allowed the costs of any proceedings undertaken by him to enforce his lien (*q*).

Of the parties entitled to make the deposit.—The deposit must be made by the person who has the ownership of, and power of disposition over, the property comprised in the deeds, and with the apparent intention of pledging the title as a security for the

parte Perry, 3 M. D. & G. 252; *Daw* v. *Terrell*, 33 Beav. 218.

(*f*) *Shaw* v. *Foster*, L. R. 5 H. L. Cas. 321.

(*g*) *Ex parte Langston*, 17 Ves. 230; *Ex parte Kensington*, 2 Ves. & B. 83; *Richards* v. *Borrett*, 3 Esp. 102.

(*h*) *Chapman* v. *Chapman*, 20 L. J. Ch. 465; *Ex parte Hooper*, 19 Ves. 477.

(*i*) *Whitbread* v. *Bulnois*, 1 Y. & Col. 303.

(*k*) *Russel* v. *Russel*, 1 Bro. C. C. 269.

(*l*) *Ex parte Coombe*, 4 Madd. 249.

(*m*) *Edge* v. *Worthington*, 1 Cox, 211; *Ex parte Bruce*, 1 Rose, 374; *Ex parte Harvey*, Mont. & Chitt. 261.

(*n*) *Ex parte Farley*, 5 Jur. 512.

(*o*) *Ex parte Smith*, 2 Mon. D. & De G. 314: *Ex parte Oakes*, *ib.* 234.

(*p*) *Meux* v. *Smith*, 2 *ib.* 789; 1 *ib.* 396.

(*q*) *Ex parte Brightens*, 1 Swanst. 3; *Ex parte Trew*, 3 Mad. 372; *Ex parte Moss*, 3 De G. & S. 599.

payment of money. A person who has casually become possessed of title-deeds, or who has received them from a person who had no authority from the owner to pledge them, cannot, of course, found any lien or charge upon the deposit. The depositary, moreover, must have all the deeds which are essential to the establishment of the title. If he has only a portion of the title-deeds, and is possessed only of insufficient and incomplete evidence of title, he cannot found thereon a lien or charge upon the land as against subsequent purchasers and mortgagees; and, if part of the title-deeds are deposited with one creditor, and part with another creditor, neither of them will obtain a lien by the deposit (*r*). The depositor of the deeds can, of course, only charge the lands to the extent of his own estate and interest therein. If a tenant for life deposits the title-deeds of the inheritance with his creditor, the estate for life only is charged, and the depositary has no lien against the remainder-man; and, if a vendor retains the title-deeds, and pledges them, he can confer a security only to the extent of his own lien upon them (*s*). If the depositor has no interest at all in the deeds, he can confer none on his depositary (*t*).

Of the extent of the lien.—The lien extends in general, in the absence of an express agreement to the contrary, to all the property comprised in the deeds, and embraces the entire estate and interest of the depositor (*u*). Where the memorandum of the deposit of the conveyance of a house *and furniture* stated, "Herewith I hand you the title-deeds of my Bognor estate as collateral security," it was held that the furniture was excluded, the words "my Bognor estate" having reference only to the house and land (*x*). But, where the lease of a dwelling-house was deposited, it was held that the tenant's fixtures in the dwelling-house were included in the lien, although they were not mentioned in the written memorandum accompanying the deposit (*y*). If deeds are deposited for the purpose of obtaining credit, the depositary has no lien upon them in respect of monies previously advanced (*z*). Where the purchaser of an equity of redemption in premises subject to a mortgage term deposited the purchase deed as a security for a loan, and afterwards paid off the mortgage and took a surrender of the term, and became bankrupt, it was held that

(*r*) *Ex parte Wetherell*, 11 Ves. 398; *Ex parte Pearse*, 1 Buck, 525; but see *Ex parte Chippendale*, 1 Deac. 67; 2 Mont. & A. 299.

(*s*) *Hooper* v. *Ramsbottam*, 6 Taunt. 12.

(*t*) *Jackson* v. *Butler*, 2 Atk. 306; *Harrington* v. *Price*, 3 B. & Ad. 170.

(*u*) *Ashton* v. *Dalton*, 2 Col. Ch. C. 565.

(*x*) *Ex parte Hunt*, 1 Mon. D. & De G. 139; 4 Jur. 342.

(*y*) *Ex parte Cowell*, 12 Jur. 411.

(*z*) *Mountford* v. *Scott*, 1 Turn. & Russ. 274.

the lien created by the deposit extended to the whole estate, freed from incumbrance (*a*). If it is stipulated, at the time of the making of the deposit, that the deeds are to be returned whenever the debt is reduced to a certain amount, there will be no lien or charge upon the land so long as the debt is kept below that amount; but, whenever the debt exceeds the sum named, the lien arises, and covers the whole amount due. The lien will extend to subsequent advances, if that appears, by the terms of the original contract, or by subsequent agreement, to have been the understanding and intention of the parties (*b*). Where the deposit was accompanied by a written agreement securing a special sum, it was held that the security might be extended to further advances by a subsequent oral contract (*c*). Such further liens, founded on further advances, may be created in favour of third parties; but they ought to be evidenced by writing (*d*).

Of the depositary's right to have the estate sold.—If the debt or the money, to secure the due payment of which the deposit has been made, is not paid by the time appointed, the depositary may obtain a decree from the court for a sale of the property, and an appropriation of the produce of the sale in satisfaction and discharge of the amount due, six months being allowed the depositor to redeem the property (*e*). The court, in this respect, follows the civil and continental law, where it is said to be the natural effect of an hypothecation "that, if the debtor does not pay, the creditor may sell, and obtain payment out of the price or marketable value of the thing hypothecated." The debtor may, at any time after the time limited for the payment of the debt has expired, and before the lands have been sold by a decree of the court, release the land, and obtain an extinguishment of the charge, by paying or tendering to the depositary the amount of the debt, unless, indeed, the deeds have been deposited under an agreement requiring notice to be given of the debtor's intention to redeem the charge, or imposing certain conditions which have not been complied with. A charge or lien resulting from a deposit of title-deeds is an assignable interest, and may be bought and sold (*f*).

In the Roman law, if the debt was not paid at the time appointed, the creditor had a right to sell the property without the authority or intervention of any court of justice, provided he duly complied with the following conditions. If the contract of hypo-

(*a*) *Ex parte Bisdee*; 1 Mon. D. & De G. 333.

(*b*) *Ex parte Linden*, 1 Mon. D. & De G. 428; *Ex parte Farley*, *ib.* 683; *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Hooper*, 19 Ves. 477; *Ex parte Alexander*, 1 Glyn. & J. 409; *Ex parte Langston*, 17 Ves. 227.

(*c*) *Ex parte Nettleship*, 2 Mon. D. & De G. 124.

(*d*) *Ex parte Whitbread*, 19 Ves. 209; *Factor* v. *Philpot*, 12 Pr. 197.

(*e*) *Pain* v. *Smith*, 2 Myl. & K. 417; *Lewis* v. *John*, 1 Coop. Ch. Pr. 10.

(*f*) *Hobson* v. *Mellond*, 2 M. & Rob. 342.

thecation gave him an express authority to take possession of the hypothecated property, and appropriate it to his use in case of the debtor's default, he might at once seize and sell it. If no such power was given him, he was bound to give notice to the debtor of his intention to sell two years before any sale could take place, and the debtor had, during all that time, the power of redeeming the charge. If he failed so to do, the creditor was, in contemplation of law, the authorised agent of the debtor for the purposes of the sale, and could transfer the right of property and possession of the thing hypothecated to the purchaser by his contract, just the same as any other agent fully authorised by the owner of property to effect a sale thereof on his behalf. Having received the purchase-money, he was at liberty to take therefrom the amount of the charge or debt, and was responsible to the debtor for the surplus. If, on the other hand, the purchase-money was insufficient to discharge such debt, the debtor continued responsible for the deficiency.

Liens on estates for unpaid purchase-money arise wherever a vendor delivers possession of an estate to a purchaser without receiving payment of the price (*g*). The lien binds the land in the hands of the purchaser, his heirs, and devisees, and all subsequent *bonâ fide* purchasers with notice (*h*). But it will not prevail against a *bonâ fide* purchaser without notice who has obtained a conveyance of the legal estate. The mere deduction of the title to the estate from the first vendor by recital will not be sufficient to affect him with notice; for that does not show that the money was not paid (*i*). A person who sells an equitable life interest in lands in consideration of the payment of an annuity has a lien upon the land for the annuity as against the purchaser (*j*). Where lands were sold, and it was agreed that the purchase-money should remain unpaid, and be a charge thereon, and advances were made by the vendor to the purchasers to enable them to build, it was held that the vendor's lien extended to these advances (*k*). A charge or lien of this description upon a newly purchased estate is termed, by the French jurists, a tacit hypothecation (*l*). It does not appear to have been known to the Roman law. The party entitled to the lien may, under certain circumstances, obtain from the court a decree for the re-sale of the property, and an appropriation of the produce of the sale in liquidation and discharge of the debt (*m*).

(*g*) Sugd. Vend. & Purch. 856, 857, ed. 1846.

(*h*) *Mackreth* v. *Symmons*, 15 Ves. 329; *Elliott* v. *Edwards*, 3 B. & P. 181.

(*i*) Sugd. Vend. 879.

(*j*) *Matthews* v. *Bowler*, 16 L. J. Ch. 239.

(*k*) *Ex parte Linden*, 1 Mon. D. & De G. 428.

(*l*) *Tell est enfin, celle que le vendeur d'un heritage a sur cet heritage, pour le prix qui lui est dû. Les lois romaines ne donnaient point cette hypotheque au vendeur; elle est de notre droit.* Pothier, Hypoth. ch. 1, s. 1.

(*m*) *Rome* v. *Young*, 3 Y. & C. 199.

The owner of land taken by a railway company is entitled to a lien upon the land so taken for the amount both of the purchase-money and of the compensation for severance (*n*), and has the same remedies for enforcing it as an ordinary vendor, although the railway company have entered and used the land for the purpose of their railway (*o*). If land is to be paid for by instalments, every payment is a part performance of the contract by the vendee, and transfers to him a corresponding portion of the estate (*p*).

Priority of liens.—As between two persons whose liens are of the same nature and quality and precisely equal, the possession of the deeds gives the priority. But, if possession of the deeds has been lost by one incumbrancer and gained by another in consequence of the perpetration of a fraud, possession of the deeds will confer no priority on the holder, although he got them *bonâ fide* and without any knowledge of the fraud (*q*). When the equities of the two parties are in all respects precisely equal, the maxim "*qui prior est tempore potior est jure*" will prevail. But, when there are several incumbrancers, and one of them, though subsequent in date, has by his greater diligence got in aid of his incumbrance a legal right, the court will give him priority (*r*). Whether the lien of a vendor for unpaid purchase-money, or that of a subsequent incumbrancer, ought to be preferred, must depend upon all the circumstances of each particular case, and upon the conduct of the respective parties; and, among the circumstances which may give to the one the better equity, the possession of the title deeds is a very material one. If the unpaid vendor, after executing a conveyance in the usual form acknowledging the receipt of the purchase-money, imprudently delivers to the purchaser the possession of the title-deeds, he arms the latter with the means of dealing with the estate as the absolute owner, and of committing a fraud; and if the purchaser raises money upon the credit of a deposit of the deeds, the equity of the depositary of the deeds will prevail over that of the unpaid vendor (*s*). To be safe, therefore, from the claim of a subsequent incumbrancer or mortgagee, the unpaid vendor must keep possession of all the title-deeds, and especially of his own conveyance to the purchaser (*t*).

Of rent-charges on lands and tenements.—The grant of a sum

(*n*) *Walker* v. *Ware, &c., Railway Company*, L. R. 1 Eq. 195; 35 L. J. Ch. 94.

(*o*) *Wing* v. *Tottenham & Hampstead Junction Ry. Co.*, L. R. 3 Ch. 740; *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; 39 L. J. Ch. 522.

(*p*) *Rose* v. *Watson*, 10 H. L. C. 672; see *Mycock* v. *Beatson*, 13 Ch. D. 384.

(*q*) *Ex parte Reid*, 12 Jur. 533.

(*r*) *Bates* v. *Brothers*, 23 L. J. Ch. 152.

(*s*) *Rice* v. *Rice*, 2 Drew, 73; 23 L. J. Ch. 292; *Roberts* v. *Croft*, 2 De G. & J. 1; 27 L. J. Ch. 220.

(*t*) *Worthington* v. *Morgan*, 16 Sim. 547; 18 L. J. Ch. 233.

of money, to issue out of the land of the grantor, and to be paid at fixed consecutive periods for a term of years, for life, or in fee, accompanied by a power of distress, creates a charge or lien upon the land, which binds the land in the hands of all subsequent purchasers and mortgagees, and descends with it to the heir-at-law. Wherever a rent-charge can be distrained for, the liability to a distress follows the land into the hands of all persons claiming under or through the grantor of the rent (*u*). A general grant of rent to a man without limitation of time will amount to a grant for the life of the grantee, if the grantor himself is seised in fee or his estate lasts sufficiently long (*x*). If a lessee for term of years grants a rent, to be issuing out of the land so held by him, for the life of the grantee, the grant is void as a rent-charge or annuity for life; but it will enure as a grant of a rent for the term and interest possessed by the grantor in the land, provided the grantee shall so long live (*y*). All owners of land of full age and under no incapacity may charge their lands with a rent-charge to the full extent of their several interests in the land, but have, of course, no power to charge it to a greater extent. The grant is in all cases good, as against the grantor himself, and those who claim through or under him, although it may be void and of no effect as against persons claiming by title paramount. A rent-charge, being in the nature of an incorporeal right, can only be granted or conveyed by deed or will. The proper mode of creation is by a deed of grant, whereby the grantor grants the rent to be issuing out of certain land, with a power of distress to the grantee for the recovery thereof. No precise form of words is necessary to create the charge, nor need the word "grant" be used in the deed (*z*); but there must be equivalent words, manifesting the plain intention of the parties to make a positive and immediate grant (*a*).

The Acts for the registration of rent-charges and annuities (*b*) do not extend to rent-charges or annuities granted for a fixed term of years or in perpetuity, or to bonds to secure the payment of pre-existing debts by instalments, or to any payments which are not strictly grants of annuities (*c*). It has been held that, if a purchaser knows at the time he purchases the land and accepts a conveyance thereof, of the existence of the rent-charge, the land shall remain liable thereto in his hands, although the charge was never registered; "for, where a man purchases with notice of a prior incumbrance, he purchases with an ill conscience, and the statute was never intended to relieve such a person" (*d*).

(*u*) Co. Litt. 162, b.; 144, a

(*x*) Perk. Grants, s. 104.

(*y*) *St. Aubyn's case*, Cro. Eliz. 153.

(*z*) Co. Litt. 147, a.; 2 Rolle, Abr. 424; Litt. sec. 221.

(*a*) *In re Locke*, 2 D. & R. 605.

(*b*) 18 & 19 Vict. c. 15, ss. 12, 13, 14.

(*c*) *Marriage* v. *Marriage*, 1 C. B. 776.

(*d*) *Cheval* v. *Nichols*, 1 Str. 664; *Greaves* v. *Tofield*, 14 Ch. D. 563.

Of the power of distress, entry, and sale.—A grant of a rent to a person who had no reversionary estate in the land, out of which the rent issued, unaccompanied by a power of distress, did not by the common law charge the land with the rent; and the grantee had no right to distrain for it. It was accordingly called a "rent seck" or dry rent. Now, however, by the 4 Geo. 2, c, 28, s. 5, it is enacted that all persons, bodies politic and corporate, shall have the like remedy by distress in the case of rents seck, rents of assize, and chief rents, as in the case of rent reserved upon lease. If a lessee for years assigns his term, reserving a rent, such rent is not a rent seck within the meaning of the statute, and cannot therefore be distrained for, unless an express power of distress has been reserved or granted in the deed of assignment; but an action must be brought upon the contract for the recovery of the arrears (*e*). "There are two ways of creating a rent: the owner of the land either grants a rent out of it, or grants the land and reserves the rent; there is no such a thing as a rent service, rent seck, or rent charge, issuing out of a term of years" (*f*). In creating a rent therefore, for life or years, or for years determinable on a life or lives, to be issuing out of a chattel interest, a power of distress is absolutely necessary to charge the land, and enable the grantee and his assignees to distrain, unless the grantee or assignee has the reversion of the lands.

It is said, moreover, that, if the grantee was never *seized* of the rent, he cannot distrain for it at all; and, as a seisin cannot be had of a chattel interest, but only a possession, an express power of distress ought to be given on creating a rent for years to be issuing out of a freehold estate (*g*). In addition to the power of distress, a power is frequently given to the grantee of a rent-charge, and to his assignees, to enter upon the lands charged in case of non-payment of the rent within a certain number of days, and hold possession of them, and receive the rents and profits, until he has satisfied the arrears due. In this case the grantee or his assignee has a right of entry, if the rent remains unpaid after the time limited, and may maintain an action for the recovery of possession of the land (*h*). But this right of entry does not extend to copyhold estates (*i*). When a rent-charge has remained in arrear and unpaid for a considerable period, the court has sometimes, under certain circumstances, ordered the property to be sold, and the

(*e*) Bro. Abr. Dette, pl. 32; *Parmenter* v. *Webber*, 8 Taunt. 593.

(*f*) *Per* Cur., —— v. *Cooper*, 2 Wils. 375.

(*g*) Litt. sec. 217, 341; 18 Vin. Abr. 474, C.; *Dixon* v. *Harrison*, Vaugh. 49; Gilb. 38.

(*h*) *Havergill* v. *Hare*, Cro. Jac. 510; Litt. sec. 327; *Jemott* v. *Cowley*, 1 Wms. Saund. 112, c.; *Doe* v. *Lord Kensington*, 8 Q. B. 429.

(*i*) Gilb. Ten. 181—185.

purchase-money to be applied in payment of the arrears (*k*). Provisions for the recovery of rent-charges by distress and other means, are contained in the Conveyancing of Law and Property Act, 1881 (*l*).

Extinguishment of rent-charges.—"If a man hath a rent-charge to him and to his heires issuing out of certaine land, if he purchase any parcel of this to him and his heires, all the rent-charge is extinct, and the annuitie also, because the rent-charge cannot by such manner be apportioned." And so, if he brings a writ of annuity and charges the person of the grantor, the land is thenceforth discharged, and the contract becomes a mere personal contract (*m*).

Lands and tenements might formerly have been hypothecated by a registered judgment.—Thus, where a debtor, by a *cognovit* or warrant of attorney, authorizes his creditor, under certain circumstances or upon a certain contingency, to sign a judgment against him for the amount of the debt, it becomes a judgment debt; and, when registered, was formerly binding upon all the lands of the debtor, as well after-acquired as those of which he was possessed at the time of the registration of the judgment (*n*); but the Law of Property Act (23 & 24 Vict. c. 38), s. 1, enacted that no judgment should affect land, of whatever tenure, as to a purchaser or mortgagee, notwithstanding notice, until a writ of execution had been issued and registered; and the 27 & 28 Vict. c. 112, enacts (s. 1) that no judgment, statute or recognizance entered up after the passing of the Act shall affect any land, whatever be the tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment, &c. (*o*). And every writ or other process of execution of any such judgment, &c., by virtue whereof land shall have been delivered in execution, shall be registered in the manner provided by the 23 & 24 Vict. c. 38, but in the name of the debtor against whom such process is issued. Provision is made (s. 4) for the sale of lands delivered in execution, and for the application of the proceeds of the sale.

Warrants of attorney, cognovits, and orders for judgment.—Warrants of attorney to confess judgment and *cognovits* must be executed in the presence of and attested by an attorney on behalf of the person giving them (*p*); and the documents themselves or true copies of them must be filed, as required by the 3 Geo. 4,

(*k*) *Cubitt* v. *Jackson*, M'Clel. 495; *Ex parte Price*, 3 Mad. 132; *White* v. *James*. 26 Beav. 191; 28 L. J. Ch. 179.

(*l*) 44 & 45 Vict. c. 41, s. 44.

(*m*) Litt. sec. 222.

(*n*) *Cuthbert* v. *Dobbin*, 1 C. B. 278; 1 & 2 Vict. c. 110.

(*o*) This applies to a garnishee order, *Chatterton* v. *Watney*, 17 Ch. D. 259.

(*p*) 32 & 33 Vict. c. 62, ss. 24, 25.

c. 39, within twenty-one days after execution, or they will be deemed to be fraudulent and void. If the warrant or *cognovit* is subject to any defeazance or condition, such defeazance or condition must be written on the same paper or parchment with the warrant or *cognovit* before it is filed, or the warrant or *cognovit* will be void (*q*). A warrant of attorney with judgment entered up, and execution issued thereon, and bill of sale by the sheriff to the judgment-creditor, has been held to be an assignment of property to such judgment-creditor by the giver of the warrant of attorney (*r*). Judges' orders for judgment made by consent, or a copy thereof, if the action is in any other court than the Queen's Bench, must, with an affidavit of the time when such consent was given, and of the residence and occupation of the defendant, be filed in the Queen's Bench within twenty-one days after the making of the order; and the 3 Geo. 4, c. 39, and the 6 & 7 Vict. c. 66, are made applicable to such orders (*s*).

Charges on lands by statute merchant, statute staple, and recognizance, when enrolled and certified, pursuant to the 29 Car. 2, c. 3, s 18, and executed pursuant to the 27 & 28 Vict. c. 112, bind the lands and tenements of the debtor in the hands of all subsequent purchasers and mortgagees (*t*). If the debt is not paid at the time appointed, execution may at once be awarded, without any mesne process to summon the debtor, or production of evidence to convict him, and all the lands to which the debtor is then entitled may be taken and delivered to the creditor, who will be entitled to hold them until the debt and costs are satisfied out of the rents and profits.

SECTION III.

MORTGAGE, ETC., OF CHATTELS (*tt*).

Mortgages of goods and chattels—If goods and chattels are bargained and sold, or granted, or assigned by one man to another upon the terms that the sale or transfer is to be void on the payment of a sum of money at an appointed period, and that the vendor or transferror is in the meantime, and until default has been made in payment of the money, to have the possession and use of the things so sold, granted, or assigned, the contract is a

(*q*) 32 & 33 Vict c 62 s 26
(*r*) *Doe* v. *Carter*, 8 T. R 300.
(*s*) 32 & 33 Vict. c. 62, s 27
(*t*) *Ellis* v. *Reg*, 8 Exch. 925.

(*tt*) The rights and liabilities of parties to bills of sale, will be found fully described in Addison on Torts, 5th ed. by Cave, pp. 422—432, 451.

contract of mortgage. If the possession only is transferred, the right of property continuing in the transferor, the contract is a contract of pledge.

A mortgage of goods and chattels may be made by simple contract (*a*) as well as by deed. If, by the terms of a bill of sale or assignment of chattels by way of mortgage, the mortgagor is to hold and enjoy the chattels as the mere servant or agent of the mortgagee, or at the will of the mortgagee, the latter is entitled to the possession of them whenever he thinks fit to call for it, and may seize and carry away and sell the property (*b*). If the mortgage-debt is to be paid on demand, and the mortgagor is to possess the mortgaged property until default has been made in payment, the mortgagee has no right of possession until demand has been made (*c*). If the mortgage-debt is to be paid by a day named, and the mortgagor is to hold possession until default has been made, there is a re-grant and bailment of the goods to the mortgagor for the intervening period, and the mortgagee has no right to the possession of them until the mortgagor's time of holding has expired, and, if he takes possession, he will subject himself to an action (*d*). But, if the mortgagor deals fraudulently with the mortgaged goods thus left in his possession, as if he attempts to sell them, the bailment is determined, the possessory title reverts to the mortgagee, and he may immediately commence an action for the recovery of the goods or their value (*e*).

Where the title deeds of land have been deposited, the equitable mortgagee is entitled to foreclosure, but this doctrine does not apply to a pledgee of personal chattels, who is only entitled to an order for sale (*f*).

If goods are assigned to the mortgagee upon trust to permit the mortgagor to hold and enjoy them until default has been made in payment of the mortgage-debt and interest by a day named, and upon further trust to sell them upon such default being made, the mortgagee has the legal right of possession incumbered with the trust as well as the right of property, and may maintain an action against anyone who wrongfully converts them to his own use (*g*). A proviso in a mortgage of chattels that, after default made in payment of the mortgage-debt after notice, it shall be lawful for the mortgagee to receive and take into possession, and thenceforth to hold and enjoy, the mortgaged chattels, and to sell and dispose of

(*a*) *Flory* v. *Denny*, 7 Exch. 585; 21 L. J. Ex. 223; *Maughan* v. *Sharpe*, 17 C. B. N. S. 443; 34 L. J. C. P. 19.

(*b*) *Mayhew* v. *Suttle*, 4 Ell. & Bl. 351.

(*c*) *Bradley* v. *Copley*, 1 C. B. 697.

(*d*) *Brierly* v. *Kendall*, 17 Q. B. 937; 21 L. J. Q. B. 161.

(*e*) *Fenn* v. *Bittleston*, 7 Exch. 152; 12 L. J. Ex. 41.

(*f*) *Carter* v. *Wake*, 4 Ch. D. 605.

(*g*) *White* v. *Morris*, 11 C. B. 1015; 21 L. J. C. P. 185.

them, and that, until default, it shall be lawful for the mortgagor to hold and make use of them, does not prevent the mortgage from operating as an immediate transfer of the right of property in the chattels to the mortgagee. The latter is the legal owner, whether in or out of possession (*h*).

A mortgage of goods and chattels and moveables (excepting ships) will, in general, be found to be a doubtful and inadequate security for the payment of money; for, as the mortgagor is left in the possession of the goods, and continues the apparent owner of them, he will be able to defeat the title of the mortgagee in a variety of ways. He may sell the goods in market overt to a *bonâ fide* purchaser, without notice of the mortgage, and so divest the mortgagee of his right of property in them, and deprive him of his security; and if the mortgagor becomes bankrupt, the chattels may become lost to the mortgagee by reason of their having been left in the possession of the mortgagor as reputed owner (*i*).

Pledges of goods and chattels.—We have already seen that, if the possession only of goods and chattels is transferred, the right of property continuing in the transferror, the contract is a contract of pledge (*ante*, p. 626).

Things which may be given in pledge.—By the common law, all kinds of goods and chattels, title-deeds, and securities for money, promissory notes and bills of exchange, letters of allotment and scrip, certificates of shares, and even money itself when marked or inclosed in a bag, purse, or parcel, so as to be capable of identification, may be pledged (*k*).

Parties entitled to pledge.—One man cannot, as a general rule, convey to another a power or right over property which he does not himself possess. If a servant takes his master's jewels and pledges them, the pledge cannot alter or affect the ownership of them, or give the pledgee any right to detain them as against the owner (*l*). But, if a man obtains goods under colour of a contract intended to transfer the property in the goods to him, and then pledges them, the pledgee will have a lien upon the goods to the amount of his advances. If, for example, a man purchases and obtains possession of a specific chattel, and pays for it by a fictitious bill of exchange, or by a cheque on a banker where he has no funds, and then pledges the article with a party who advances money upon it without any knowledge of the fraud, the pledgee will have a lien upon his advances against the vendor who has been defrauded (*m*); but, if the property has not passed—if, for instance,

(*h*) *Gale* v. *Burnell*, 7 Q. B. 850.

(*i*) *Shuttleworth* v. *Hernaman*, 1 De G. & J. 322.

(*k*) *Isaack* v. *Clark*, 2 Bulstr. 306; *Ross* v. *Moses*, 1 C. B. 232.

(*l*) 34 Hen. 6, fol. 25, pl. 33; *Hartop* v. *Hoare*, 3 Atk. 44, 2 Str. 1187.

(*m*) *Parker* v. *Patrick*, 5 T. R. 175;

the article has been stolen, or possession thereof has been obtained by false pretences—and it has then been pledged, the pledgee will have no lien upon it as against the owner. If a person obtains possession of a delivery-order, dock warrant, or any documentary evidence of title to goods on the faith of a false and fraudulent representation, and obtains possession of the goods under the order, or gets them transferred into his name, or obtains warrants for their delivery to his order, and then pledges the goods or warrants, the pledgee will have no title to detain them as against the owner who has been defrauded (*n*). If the pawnor has only a limited interest in the subject-matter of the pledge, he can only pawn to the extent of such interest, and, when that expires, the pawnee must surrender the pledge to the party who succeeds to the legal ownership. Therefore, where a quantity of plate was settled upon a widow for life, and she pawned it and then died, it was held that the pawnee had no right to detain the pledge as against the remainderman, although he had no notice of the widow's limited interest at the time he advanced the money (*o*). If the vendor of an estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase-money, the property of the title-deeds is so vested in the purchaser, that the vendor obtaining possession of them and pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase-money (*p*).

Implied warranty of title on the part of the pledgor.—Every person who pledges goods and chattels and personal property impliedly undertakes that the property pledged is his own; and, if it turns out not to be so, the pledgee may restore it to the lawful owner coming forward and claiming the goods, and may set up the *jus tertii* in answer to an action by the pledgor for the recovery of the pledge (*q*). Every person, on the other hand, who receives goods and chattels into his possession by way of pawn or pledge, impliedly undertakes to return them to the pawnor as soon as the object of the pledge has been accomplished, unless it be shown that the pledgor had no right to pledge them, and the owner has intervened and claimed them. Nothing contained in the Factors' Acts is to prevent (5 & 6 Vict. c. 39, s. 7) the owner from having the right to redeem such goods or documents of title, at any time

White v. *Garden*, 10 C. B. 926; 20 L. J. C. P. 168.

(*n*) *Kingsford* v. *Merry*, 1 H. & N. 503.

(*o*) *Hoare* v. *Parker*, 2 T. R. 376.

(*p*) *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

(*q*) *Cheesman* v. *Exall*, 6 Exch. 344; *Jones* v. *Peppercorne*, 28 L. J. Ch. 158; *Biddle* v. *Bond*, 34 L. J. Q. B. 137; unless he always knew that the pledgor had no title and that the adverse claimant had, and has dealt with the goods in a way creating an estoppel, see *Ex parte Davies*, 19 Ch. D. 86.

before they have been sold, upon repayment of the amount of the lien thereon. If the pledge has been received as security for the due payment of a debt or the performance of a contract, it must be returned by the pawnee as soon as the debt is discharged or the contract has been fulfilled, unless it has been lost or destroyed by accident, without any default or misconduct or want of proper care on the part of such pawnee.

The Act protects every *bonâ fide* advance, but only *bonâ fide* advances, not antecedent liabilities (whether they may or may not have ripened into debts) where no actual advance is made at the time of the pledge. Therefore, where a factor pledged goods of his principal with G.; first to secure the payment of an acceptance of the factor's in G.'s hands, not then due, which had been given to protect G.'s liability on a contract as the factor's broker; secondly, to repay G. his loss on a re-sale of goods which G. had purchased for the factor in his own name, it was held that the transaction was not within the Act (*r*).

By the 40 & 41 Vict. c. 39, s. 2.—Where any agent or person has been entrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his entrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents.

By sect. 3.—Where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor, or any person or agent entrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person entrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold.

By sect. 4.—Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent entrusted by the vendee with the documents within the meaning

(*r*) *Macnee* v. *Gorst*, L. R. 4 Eq. 315.

of the principal Acts as amended by this Act shall be as valid and effectual as if such vendee or other person were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.

By sect. 5.—Where any documents of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bonâ fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu.*

Of the pledgor's right of redemption.—A thing may be pledged for a certain period, or it may be pledged indefinitely, no time being fixed for its redemption, or for the happening of the event which is to give the pledgor a right to have it back. In the first case the pledgee cannot demand payment of the debt, nor can the pledgor lawfully demand the restoration of the pledge, until the time appointed has expired. In the second case the pledgor is entitled to redeem at any time, by tendering to the pledgee the amount due to him, and the pledgee may compel the pledgor to redeem, or be foreclosed and lose his right of redemption altogether. The rights and remedies conceded by the common law to the pledgors and pledgees of lands and chattels in the twelfth century, before the modern system of mortgage had sprung up, are described in the learned and interesting treatise of Ranulph de Glanville (*s*). At the present day, if the debtor pays the debt due, or tenders it to the creditor, and demands the pledge, and the creditor refuses to deliver it up, the debtor may maintain an action for its recovery, unless his right to redeem has been barred by judgment of foreclosure, or has been forfeited under an express clause of forfeiture inserted in the original contract, or unless the pledge has been sold by the creditor pursuant to a power of sale reserved to him (*t*). It is laid down in the Roman law, that mere length of possession alone by the pledgee will not have the effect of vesting the pledge in him, and that his heirs and executors remain perpetually obliged to restore the pledge, and cannot

(*s*) Beame's Glanville, p. 260.

(*t*) *Ratcliffe* v. *Davies*, Cro. Jac. 245; Yelv. 178; 1 Bulst. 29, 31; *Kemp* v. *Westbrook*, 1 Ves. sen. 278.

acquire the ownership and right of property thereof by prescription (*u*).

Sale of the pledgor's right of property and right of redemption.—As the ownership and general right of property in the pledge remain vested in the pledgor, the latter may sell the pledge subject to the lien of the pledgee, and substitute the purchaser in his place, so as to entitle the latter to redeem (*x*). If several chattels are pawned for one sum, separate sales may be made of each to different purchasers; but the pawnee will not be bound to part with any of the chattels until his whole debt is paid. Subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made.

Forfeiture of the pledge.—By the early Roman law the debtor and creditor might agree that, if the debtor did not pay the debt within a specified period, the pledge should be forfeited, and should become the absolute property of the creditor. But a law of Constantine prohibited such contracts, on the ground that they were unjust and oppressive to debtors, and declared that every agreement should be null and void which provided that the thing pledged should pass to the creditor without any sale or appraisement, or that the debtor should forfeit his right of redemption if he failed to pay at the proper time (*y*). This law of Constantine has been imported into the French law (*z*) and the modern law of continental Europe. "The creditor cannot," observes Domat, "stipulate that, if he is not paid at the time appointed, the thing pledged shall become his own property; for such an agreement would be *contra bonos mores;* for the pledge is given to the creditor only as a security for the debt, and not to enable him to profit by the indigence of his debtor" (*a*). Our own common law does not follow the later Roman and Continental law in this respect, and has not, hitherto, considered agreements for the forfeiture of pledges to be null and void, as being contrary to public policy. The court, however, acting in accordance with the rules and principles of the civil law, will relieve against the forfeiture, as we have already seen, in the case of pledges of land, (*ante*, p. 600); but it will not, in general, interfere in the case of pledges of moveables (*b*), unless the value of the pledge greatly exceeds the amount of the debt which it was intended to secure.

Foreclosure of the right of redemption.—Pledgee's power of

(*u*) Cod. lib. 10, tit. 24, lex 10.

(*x*) *Franklin* v. *Neate*, 13 M. & W. 486.

(*y*) Cod. lib. 8, tit. 35, lex 3; Mackeldey's Civil Law, by Kaufman, s. 349.

(*z*) *Cette loi a été adoptée dans notre jurisprudence. Elle est nécessaire pour empêcher les fraudes des usuriers.* Poth. NANTISSEMENT, No. 18.

(*a*) Domat liv. 3, tit. 1, s. 3, 11.

(*b*) *Lockwood* v. *Ewer*, 9 Mod. 278.

sale.—It would appear to be an implied term of every contract of pledge that the thing deposited shall be made available for the liquidation of the debt it was intended to secure, in case the pledgor is unable or unwilling to pay such debt (*c*). The law will not condemn the pledge to remain useless in the hands of the creditor, or suffer it to perish, but will enable the latter, after due notice given to the debtor, and every fair opportunity afforded him to redeem, to sell the pledge and appropriate the proceeds of the sale in liquidation and discharge of the debt, paying over the surplus that may remain to the creditor (*d*); or, if the value of the pledge does not exceed the amount of the debt due upon it and the costs and expenses of a sale, the creditor will be allowed to appropriate the pledge to his own use, and hold it as his own property, discharged of all claim of ownership and right of redemption on the part of the creditor. The ancient form of foreclosing or barring the pledgor's right of redemption by writ of summons commanding him to redeem the pledge or appear in court and answer the complaint of the pledgor, and admit or deny the pledge and the debt, is described by Glanville. If the debtor appeared and admitted the pledge, he was commanded to redeem it within a reasonable period; and, if he failed to comply, liberty was given to the creditor from that time to treat the pledge as his own property, and dispose of it as his own. If the debtor denied the pledge and the debt, the creditor was put to the proof thereof (*e*).

Lord Hardwicke is reported to have said that a decree of foreclosure is not necessary, in cases of pledges of personal chattels, to bar the pledgor's right of redemption, and enable the pledgee to sell (*f*); but, so long as the ownership and right of property in the pledge have not been vested in the pledgee, the latter cannot sell more than his own claim or lien upon the pledge, and can only transfer the pledge burthened with the pledgor's right of redemption, unless a power of sale has been expressly or impliedly reserved to him by contract (*g*). In order to make himself the owner of the pledge, the pledgee must bar the pledgor's right of redemption by a decree of foreclosure (*h*). "A right of lien gives no right to sell the goods;" but, if it is reasonably to be inferred, from the nature of the transaction between the parties, that the contract was to this effect, "If I (the borrower) repay the money, you must re-deliver the goods; but, if I fail to re-pay it, you may use the security I have left in your hands to re-pay yourself," the

(*c*) Story on Bailments, s. 311.

(*d*) *Pigot* v. *Cubley*, 15 C. B. N. S. 701; 33 L. J. C. P. 134; Willes, J., *Martin* v. *Reid*, 31 L. J. C. P. 126.

(*e*) Beame's Glanville, 254, n. 1.

(*f*) *Lockwood* v. *Ewer*, 9 Mod. 279.

(*g*) *Mickelthwaite* v. *Merrill*, 19 L. T. R. 61.

(*h*) *Wayne* v. *Hanham*, 9 Hare, 62; 20 L. J. Ch. 530.

pledgee will then be entitled to sell, after notice to the pledgor of his intention, and may satisfy the debt out of the proceeds of such sale (*i*). If the deposit has been made to secure the payment of a sum of money by a day certain, there is, it has been held, an implied authority to sell in case of non-payment by the day named (*k*); but notice should be given to the debtor in order to bar the equity of redemption. If notice is given to the pledgor that, unless the pledge is redeemed, and the debt due thereon paid by a given day (a reasonable time for redemption being allowed), the pledge will be sold by public auction, and the proceeds of the sale applied in liquidation of the debt, and the pledgor neglects to redeem, and pays no attention to the notice, and the sale then takes place, the pledgor may fairly be deemed to have authorised the sale, or to be an assenting party thereto (*l*).

By the Roman law the contract of pledge was held to carry with it an implied authority from the pledgor to the pledgee to sell the pledge in case of non-payment of the debt due thereon. In conducting the sale the creditor was deemed to be the mandatary or agent of the debtor, selling on behalf of the latter; and he was consequently bound to promote the interests of the debtor to the utmost of his power. He could not himself become the purchaser of the pledge, either directly or indirectly. An action for eviction from want of title could not be brought against him by the purchaser after the sale, but only against his principal, the pledgor, unless he had sold *malâ fide*, or without any right to sell, in which case he was himself responsible for all the damages that resulted from the sale (*m*). If, after the pledge had been offered for sale with the necessary formalities, an acceptable purchaser could not be found, the creditor might then apply to the court to have it appraised and adjudged to him at its value. Still, even in this last case, the debtor had a right of redemption for two years after the decree (*n*). If it was made part of the contract that the creditor should be entitled to take the pledge himself in case of default, at a price to be mutually agreed upon between himself and the debtor, or to be fixed by the court or some third party this agreement might be enforced as a conditional sale (*o*). In the French law, when an express power of sale has been reserved by the contract, the creditor may summon the debtor to pay, and in default of payment, procure a judge's order for the sale, after a

(*i*) *Pothonier* v. *Dawson*, Holt, 385; *Smart* v. *Sandars*, 3 C. B. 401; 5 *ib.* 915.

(*k*) *Pigott* v. *Cubley*, *ante*, p. 632.

(*l*) *Tucker* v. *Wilson*, 1 P. Wms. 260.

(*m*) Dig lib. 20; lib. 13, tit. 8, lex. 4; Cod. lib. 4, tit. 24; lib. 8, tit. 13-34; Mackeldey's Civil Law, s. 350.

(*n*) Cod. lib. 8, tit. 22, tit. 34; Dig. lib. 42, tit. 1.

(*o*) Dig. lib. 20, tit. 1, lex 16; s. 9; Domat, liv. 2, tit. 1, ss. 3, 11.

certain time to be given for redemption at the discretion of the judge (*p*).

Accounts between pledgor and pledgee.—Whenever the pledge has been sold by the pledgee, he is liable to be called upon to account for the proceeds of the sale, and to pay over to the pledgor any surplus that may be found to exist after deducting the debt, costs, and expenses. The possession of the pledge does not suspend the right of the pledgee to proceed personally against the pledgor for the recovery of the debt in respect of which the pledge was taken, as it is only a collateral security (*q*). In the Roman law, if the pledgee neglected to make the pledge available for the liquidation of the debt when he ought to have done so by the terms of the contract, he could not proceed personally against the debtor (*r*).

Of the custody and safe keeping of the pledge.—Every person who receives goods and chattels or securities into his possession by way of pawn or pledge impliedly undertakes to take the same care of them that a prudent and cautious man ordinarily takes of his own property. His liability, in this respect, is analogous to that of the hirer of chattels for use (*ante*, p. 343), the contract being, like the contract of letting and hiring, a contract for the mutual benefit of both parties, and not a contract for the sole and separate advantage of one of them, to the exclusion of the other, like the contract of deposit or the contract of borrowing and lending. The pawnee or pledgee, consequently, is not responsible for the loss of the goods by robbery or accident, if he has taken ordinary and reasonable care of them (*s*): and he may, notwithstanding the loss and his consequent inability to return the deposit, sue for the recovery of his debt. But, if the goods have been stolen under circumstances manifesting a want of ordinary and reasonable care for their safety, he will of course be responsible for the loss. And it is not enough for the pawnee to say that the goods have been lost by robbery or accident; he must prove the fact, and show that he was free from blame (*t*).

Use of things pledged.—"If the pawn be something that will be the worse for wear, as clothes, the pawnee cannot use it; but, if it will not be the worse for wear, as jewels, the pawnee may use

(*p*) Domat, liv. 3, tit. 1, ss. 3, 10.

(*q*) *Lawton* v. *Newland*, 2 Stark. 72; *South Sea Company* v. *Duncomb*, 2 Str. 919; Holt, 461; *Anon.*, 12 Mod. 564; Scott v. *Parker*, 1 Q. B. 809.

(*r*) Pand. lib. 10, tit. 6; Cod. lib. 8, tit. 14, lex 24.

(*s*) *Syred* v. *Carruthers*, Ell. Bl. & Ell. 469; 27 L. J. M. C. 273. *Placuit sufficere, si ad eam rem custodiendam exactam diligentiam adhibeat, quam is præstiterit, et aliquo fortuito casu rem amiserit, securum esse, nec impediri creditum petere*; Instit. lib. 3, tit. 15, s. 4, copied by Bracton, 99 b.; Dig. lib. 13, tit. 6, lex 5, s. 2; tit. 7; lex 14.

(*t*) *Doorman* v. *Jenkins*, 2 Ad. & E. 256; Cod. lib. 4, tit. 24, lex 5; GLANVILLE by Beames, p. 253.

them; but then it must be at his peril; for, if he is robbed in wearing them, he is answerable. Also, if the pawn be of such a nature that the keeping is a charge to the pawnee, as if it be a cow or horse, the pawnee may milk the cow or ride the horse; and this is in recompense of the keeping. If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them at all events; because the pawnee, by detaining them after tender of the money," (the time of payment having arrived, or no time being fixed), "is a wrongdoer, and it is a wrongful detainer of the goods; and a man that keeps goods by wrong must be answerable for them at all events" (u).

If a pawnee re-pawns or sells, before any default in payment by the original pawnor, the latter cannot sue the sub-pawnee or vendee to recover the pledge without paying or tendering the amount for which the pledge was originally made (x).

As the right of property in the pledge remains, as we have already seen, in the pledgor until foreclosure, forfeiture, or sale, the pledgor may maintain an action against a stranger who unlawfully possesses himself of the goods; but, if there is any injury or conversion by a stranger for which an action will lie on the part of both the pledgor and pledgee, a recovery by one ousts the other of his right to recover; for there cannot be a double satisfaction (y). If the pledgor has sold his interest in the pawn to a third party, the latter will be the proper person to sue for damages resulting from injury to the pawn from the default or negligence of the pawnee, as the owner for the time being is the proper plaintiff (z).

Statutory rights and liabilities of pawnbrokers.—The rights and liabilities of pawnbrokers are now regulated by the Pawnbrokers' Act, 1872 (a), which took effect from December, 31st, 1872. The Act, however, does not apply to loans of above ten pounds, or to loans made before the commencement of the Act, which are regulated by the old law.

Who are to be deemed pawnbrokers.—Every person who keeps a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases, or receives, or takes in any goods or chattels, and pays, or advances, or lends thereon any sum of money not exceeding 10*l*., with or under any agree-

(u) *Coggs* v. *Bernard*, 2 Ld. Raym. 912; Smith's Leading Cases, 5th ed. 182.

(x) *Johnson* v. *Stear*, 15 C. B. N. S. 330; 33 L. J. C. P. 130; *Johnson* v. *L. & Y. Ry. Co.*, 3 C. P. D. 499; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; 35 L. J. Q. B. 232; 7 B. & S. 783; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; 37 L. J. Ex. 174.

(y) Bac. Abr. TROVER, C.; *Booth* v. *Wilson*, 1 B. & Ald. 59.

(z) *Franklin* v. *Neate*, 13 M. & W. 486.

(a) 35 & 36 Vict. c. 93.

ment or understanding, express or implied, or to be from the nature and character of the dealing reasonably inferred that such goods or chattels may be afterwards redeemed or re-purchased on any terms whatever, is to be deemed to be a pawnbroker within the meaning of the Act (*b*). Every pawnbroker's name must be placed over the door of his place of business (*c*); and therefore a secret partnership in the business of a pawnbroker is illegal and void (*d*).

Sale of things pledged.—Pawnbrokers' sales are regulated by the provisions of the Pawnbrokers' Act. If, at any time before the sale has actually taken place, the pledgor tenders the principal, interest, and expenses incurred, he has a right to have back the things pledged, and the pawnbroker cannot lawfully proceed with the sale (*e*).

Warranties on sales of unredeemed pledges.—We have already seen that, in the case of sales by pawnbrokers of unredeemed pledges expressly sold as such, the pawnbroker only warrants the subject-matter of the sale to be a pledge, the time for the redemption of which has expired. He sells merely his own title and interest in the pledge; and it is the duty of a purchaser to investigate that title (*post*, pp. 971, 972); and, if he is evicted by reason of the want of title in the pledgor to make the pledge, he has no remedy over against the pawnbroker, unless the latter expressly warranted the title.

The indemnity given by sect. 25 to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only as between the pawnor or owner who has authorised the pledging of the goods, but does not affect the common law rights of an owner of goods pledged against the owner's will (*f*).

Imperfect hypothecation of goods and chattels—Licenses to distrain to secure payment of a debt.—The common law repudiates the hypothecation of chattels or moveables in its general and extended signification; for, if parties who had bought things in a public market, or in the ordinary way of trade, of persons who had the possession and visible ownership of them, were liable, after they had paid the purchase-money, to be called upon by third parties who had secret charges or liens upon such goods for further payment, all public confidence would be destroyed, and trade and commerce annihilated. But the law permits goods and chattels to be subjected to what is called by continental jurists imperfect hypothecation, *i.e.*, a debtor may, by deed under seal, grant to his

(*b*) 35 & 36 Vict. c. 93, s. 6.

(*c*) 35 & 36 Vict. c. 93, s. 13.

(*d*) *Armstrong* v. *Lewis*, 2 Cr. & M. 297: 3 Myl. & K. 53; *Gordon* v. *Howden*, 12 Cl. & Fin. 242; *Frazer* v. *Hill*, 1 Macq. H. L. C. 392.

(*e*) *Waller* v. *Smith*, 5 B. & Ald. 441.

(*f*) *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37.

creditor a right to seize and sell a specified chattel, or all his goods and chattels generally, in satisfaction and discharge of the debt, in case of the non-payment thereof at an appointed period. Such a power gives the creditor no right to follow the goods into the hands of third parties; but so long as they remain in the possession of the debtor himself and continue his property, the creditor may seize them in the same way that a landlord distrains and sells the goods and chattels of his tenant on the demised premises for rent in arrear (*g*). A power of this description may be made to extend to all the after-acquired chattels of the debtor, as well as to the goods and chattels of which he was possessed at the time of the contract or grant, and is analogous to the power possessed by a creditor in the Roman and Continental law under a general hypothecation of present and after-acquired property. Where the owner of a cow, being indebted to the defendant for ajistment, and being desirous of contracting a further debt for straw, &c., agreed with the defendant that the cow should stand as a security for the debt, and that the defendant should be at liberty, upon a certain contingency, to take the cow wherever he could find her, and hold her till he was paid, and, the contingency having happened, the defendant seized the cow, it was held that he had a right so to do, and that he was entitled to detain her as against the owner, until he received payment of his debt (*h*). The right of detainer gives no right of sale, although it is exercised at great expense (*i*); but, if a debtor gives to his creditor a licence to enter upon his land and seize his cattle and crops and sell them in satisfaction and discharge of the debt, the license will be justified as against the licensor, in seizing and selling under the license (*k*). But the operation of a license of this description cannot be extended beyond the immediate parties to it; and, therefore, as soon as the rights of third persons intervene, the power or authority becomes nugatory and useless. Thus, where a vendor entered into a written agreement for the sale of a coach on credit, upon the terms that, if the price was not paid pursuant to the agreement, he "should have and hold a claim upon the coach;" and the purchaser died, and, the money not being paid, the vendor got possession of the coach and detained it as a security for the debt; it was held that, although he would have been justified in so doing as between himself and the purchaser, yet, the latter being dead, he had no right to detain it as against the purchaser's personal representative (*l*), or against a trustee in bankruptcy (*m*). Neither

(*g*) *Chidell* v. *Galsworthy*, 6 C. B. N. S. 471.

(*h*) *Richards* v. *Symons*, 8 Q. B. 90.

(*i*) *Thames Ironworks, &c.*, v. *Patent Derrick Co.*, 29 L. J. Ch. 714.

(*k*) *Carr* v. *Allatt*, 27 L. J. Ex. 385.

(*l*) *Howes* v. *Ball*, 7 B. & C. 484.

(*m*) *Carr* v. *Acraman*, 11 Exch. 566.

can the license be assigned or granted over to another so as to enable the assignee to distrain upon the licensor (*n*); nor can it prevail against the claim of a judgment creditor, so long as parties claiming under it have not perfected their title by taking possession of the property before it is seized in execution by the sheriff. A legal interest in the property, *bonâ fide* acquired before possession taken by the person claiming under the license, will prevail over the claim of the latter (*o*). A promise to pay money when the debtor receives a debt due to him from a third person does not amount to an equitable charge on the debt (*p*).

Revocation of the license by act of bankruptcy.—A license to seize and sell chattels in satisfaction and discharge of a debt gives no title to any specific chattels; but, when executed by the creditor's taking possession of property under the license, it clothes the licensee with the ownership of such property (*q*). If, therefore, a debtor, after he has granted his creditor a license of this description, assigns all his property to trustees for the benefit of the creditors, the license will be annulled as regards the property so assigned; and, if the assignment should be void as being an act of bankruptcy, the property would be transferred to the trustee in bankruptcy free from the operation of the license (*r*).

Mortgages of ships and of shares in vessels.—It was at one time held that the Court of Chancery would give no effect to a contract to assign a ship as security for money due not registered in accordance with the 17 & 18 Vict. c. 104 (*s*). But by the 25 & 26 Vict. c. 63, s. 3, the expression "beneficial interest," whenever used in the second part of the 17 & 18 Vict. c. 104, includes interests arising under contract and other equitable interests; and the intention of that Act is declared to be that, without prejudice to the provisions contained therein for preventing notice of trusts from being entered in the register book or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the Act on registered owners and mortgagees, and without prejudice to the provisions therein contained relating

(*n*) *Brown* v. *Metropolitan Counties, &c.*, 28 L. J. Q. B. 236.

(*o*) *Reeve* v. *Whitmore*, *Martin* v. *Whitmore*, 33 L. J. Ch. 63; and see *Holroyd* v. *Marshall*, 33 *ib.* 193.

(*p*) *Field* v. *Megaw*, L. R. 4 C. P. 660.

(*q*) *Congreve* v. *Evetts*, 10 Exch. 308; 23 L. J. Ex. 273.

(*r*) *Carr* v. *Acraman*, 11 Exch. 566; 25 L. J. Ex. 90; *Baker* v. *Gray*, 17 C. B. 462; 25 L. J. C. P. 161.

(*s*) *Liverpool Borough Bank* v. *Turner*, 29 L. J. Ch. 827; see *Chasteauneuf* v. *Capeyron*, 7 Ap. Cas. 127. A British ship seems to be a ship intended to be the property of a British owner. *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243, C. A.

to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interest therein in the same manner as equities may be enforced against them in respect of any other personal property (*t*). The mortgagee is not to be deemed to be the owner of the ship or share (*u*), nor the mortgagor to have ceased to be owner, except in so far as may be necessary for making such ship or share available as a security for the mortgage-debt. The mortgagor in possession may employ and charter the ship; and the court will restrain the mortgagee from interfering with his contracts (*x*). The mortgagee has power absolutely to dispose of the mortgaged ship or share, and to give effectual receipts for the purchase-money; but, when there are several mortgages, no subsequent mortgagee can, except under an order of court, sell such ship or share without the concurrence of every prior mortgagee. A registered mortgage of a ship or share is not affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding the mortgagor at the time of his becoming bankrupt may have the ship in his possession and disposition, and be reputed owner thereof. Provision is made for the transfer of mortgages, and for the transmission of the interest of mortgagees by death, bankruptcy, insolvency or marriage (*y*). The guardian of a registered infant owner of a ship has no power under the Merchant Shipping Act, s. 99, to sell or mortgage the ship on behalf of the infant (*z*).

A mortgagee who takes possession of a ship, or gives the charterer notice of his mortgage, and demands the freight before the freight becomes payable, is entitled, as against the mortgagor and his assigns, to receive it (*a*); but until the mortgagee takes possession or does some equivalent act, the mortgagor is entitled to the freight, and is not accountable to the mortgagee for what he receives (*b*). When the mortgage is of the entirety of the vessel, the mortgagee may take exclusive possession; when it is of shares only, he cannot take possession so as to prevent the other part-owners from also taking possession. A mortgagee of shares in a ship may, without formally taking possession, give notice of his

(*t*) See *Ward* v. *Beck*, 32 L. J. C. P. 113; and *Hughes* v. *Sutherland*, 7 Q. B. D. 160.

(*u*) *European, &c., Co.* v. *Royal Mail, &c., Co.*, 4 K. & J. 676; *Dickinson* v. *Kitchen*, 8 Ell. & Bl. 789; *Marriott* v. *Anchor Reversionary Co.*, 30 L. J. Ch. 122, 571.

(*x*) *Collins* v. *Lamport*, 34 L. J. Ch. 196.

(*y*) 17 & 18 Vict. c. 104, ss. 66—83.

(*z*) *Michael* v. *Fripp*, L. R. 7 Eq. 95; 38 L. J. Ch. 29.

(*a*) *Rusden* v. *Pope*, L. R. 3 Ex. 269; 37 L. J. Ex. 137; *Brown* v. *Tanner*, L. R. 3 Ch. 597; 37 L. J. Ch. 923; *Wilson* v. *Wilson*, L. R. 14 Eq. 32; 41 L. J. Ch. 423.

(*b*) *Keith* v. *Burrows*, 2 Ap. Cas. 636.

interest, and require payment to himself of his share of the freight (c). Until possession is taken by the mortgagee, the mortgagor remains *dominus* of the ship as to its employment or rate of freight (d). A mortgagee of a ship is entitled to payment in priority to materialmen not in such actual possession at the time of supplying the materials as to give them a lien (e). A subsequent mortgage, duly registered, of a ship has priority over a claim for necessaries (f). The first registered mortgagee of a ship, by taking possession of her before the freight is completely earned, obtains a legal right to receive the freight, and to retain thereout, not only what is due on his first mortgage, but also the amount of any subsequent charge he may have acquired on the freight, in priority to every equitable charge of which he had no notice; and it makes no difference that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight (g). The effect of an omission to register a mortgage of a ship is to postpone the mortgagee's claim to that of a subsequent registered mortgagee or transferee; but such omission is no answer to a claim by the first mortgagee for freight, as against a purchaser of the cargo without notice of the mortgagee's title (h). A claim by a master for disbursements takes rank as a maritime lien, and is prior to the claim of the mortgagee of the ship (i).

Maritime liens—Bottomry.—The contract of hypothecation of ships known to the civil law, and enforced in our courts of Admiralty, is a contract whereby the captain of a vessel in a foreign port, not having any credit in the port where the vessel is lying, is enabled to obtain money for the repair and equipment of the vessel, and for supplies and sea stores for the prosecution of the voyage (k), by creating a charge or lien upon the vessel itself in favour of the lender, so that, if the vessel is sold or mortgaged by the owners, it will pass burthened with the charge or debt into the hands of the purchaser or mortgagee. The charge or lien created by a contract of this description is called a maritime lien. Wherever a maritime lien exists, it gives a right or claim upon a vessel, *jus ad rem*, to be carried into effect by legal process. This claim travels with the vessel into whosesoever possession it may

(c) *Cato* v. *Irving*, 21 L. J. Ch. 675; *Willis* v. *Palmer*, 7 C. B. N. S. 340; 29 L. J. C. P. 194; *Gardner* v. *Cazenove*, 1 H. & N. 435; 26 L. J. Ex. 17.

(d) *Keith* v. *Burrows*, 2 Ap. Cas. 636.

(e) *The Scio*, L. R. 1 Ad. 353.

(f) *The Pacific*, 2 B. & L. 243; *The Two Ellens*, L. R. 3 Ad. 345; 41 L. J. Ad. 33.

(g) *Liverpool Marine Credit Co.* v. *Wilson*, L. R. 7 Ch. 507; 41 L. J. Ch. 798.

(h) *Keith* v. *Burrows*, 1 C. P. D. 722, reversed on appeal upon another point; 2 C. P. D. 163; affirmed 2 Ap. Cas. 636.

(i) *The Mary Anne*, 35 L. J. Adm. 6.

(k) *The Huntley*, 1 Lush. 24; *The Edmond*, 30 L. J. Adm. 128; but disbursements for charges for which the consignee of the cargo is liable are not the subject of bottomry. *Ib.*

come, and is enforced in the Court of Admiralty by a proceeding *in rem* (*l*).

By the Roman law every person who repaired or fitted out a vessel, or lent money for those purposes, had a lien upon the ship without a formal instrument of hypothecation. But by the law of England no such right can be acquired but by express agreement; and a ship-master can only make such an agreement if he act within the scope of his authority. The contract by which a maritime lien is generally created by English ship-masters is termed a contract of bottomry, from the keel or bottom of the vessel being generally expressly hypothecated, or charged with the payment of the debt, and being used figuratively in the contract to denote the whole ship. It is essential to the validity of this species of hypothecation that the sea risk should be incurred by the lender, that is to say, that the debt should be incurred, and charged upon the vessel, upon the understanding that, if the vessel is lost, the lender loses his money, but, if it arrives safe at the port of destination, it shall stand charged with the payment of the debt. The master has no authority to hypothecate the vessel in any other manner (*m*); and the Court of Admiralty has no jurisdiction to enforce any other contract (*n*). As a remuneration for this risk, the creditor has always been entitled to take and charge upon the vessel any rate of interest or remuneration for the loan or debt that the parties might agree upon, termed maritime interest (*o*). The only events which will discharge a bottomry bond are payment and an absolute total loss. A constructive total loss of the ship does not discharge the bond (*p*).

Of the power of hypothecation of the ship-master.—The extent of the authority of the master of a vessel to bind the owners either of the ship or cargo, is derived from, and governed by, the law of the flag (*q*). By our law the ship-master has no right to create a lien upon the vessel, until he has made every reasonable endeavour to obtain supplies, repairs, or money, upon his own personal credit or that of the owners (*r*). It is not until all other means of obtaining necessaries fail that he has authority to hypothecate the ship, and to give maritime interest, which is in effect defeating the object of the adventure, and transferring to the creditor much of

(*l*) *Harmer* v. *Bell*, 7 Moore, P. C. 267; *Menetone* v. *Gibbons*, 3 T. R. 267; *Ladbroke* v. *Crickett*, 2 ib. 649.

(*m*) *Stainbank* v. *Fenning*, 11 C. B. 51; 20 L. J. C. P. 226.

(*n*) *The Royal Arch*, 1 Swabey, 281; *The Indomitable*, 5 Jur. N. S. 632; *The Ida*, L. R. 3 Ad. 542; 41 L. J. Adm. 85.

(*o*) *Joy* v. *Kent*, Hardr. 418.

(*p*) *Thomson* v. *Royal Exchange Ass. Soc.*, 1 M. & S. 30; *Broomfield* v. *Southern Insurance Co.*, L. R. 5 Ex. 192.

(*q*) *The Karnak*, L. R. 2 A. & E. 289, ib. 2 P. C. 505; 37 L. J. Adm. 41; 38 ib. 57.

(*r*) *Heathorn* v. *Darling*, 1 Moore, P. C. C. 5; *The Nelson*, 1 Hag. 176; *La Ysabel*, 1 Dod. 273; *The Orelia*, 3 Hag. 84; *The Dunvegan Castle*, ib. 331

the profits of the voyage. If the master at a foreign port is able to communicate speedily with the owners, it is his duty to do so before he orders repairs or supplies (*s*); and, where practicable, he must do so before he can create a lien on the vessel or cargo (*t*). It is no excuse for not communicating with the owner under such circumstances, that he is insolvent, unless he has been judicially declared so, and the ownership of the vessel has vested in his trustee in bankruptcy, in which case notice should be given to the trustee (*u*). If the ship-master borrows money for his own purposes or for those of the consignee of the cargo (*x*), as distinguished from those of the ship-owners, his contract will fail to create a lien upon the vessel (*y*). Repairs executed, or advances made, on personal credit cannot afterwards be converted into a bottomry transaction. There may, however, be cases of extreme urgency, where the master is dead, and the merchant advances money intending to require a bottomry bond from the beginning, and gives the owners the earliest possible notice of his intention, in which the bond might be upheld, though no agreement for it was originally made; but they are cases of exception to the general principle. The master ought, in general, to be distinctly apprised of the intention of a lender of the money to require a bottomry bond, that he may have time and opportunity to exercise his discretion as to entering into the contract, or to try at least to take other means to avoid the necessity, to advise with the owners of the ship and cargo, if it be practicable, or, if not, at least to consult with persons on the spot.

But, although when a ship-master orders repairs and supplies on credit given to him personally, those who gave the credit cannot take a bottomry bond, yet a merchant, a stranger to the transaction, or even an agent, if he has not made himself responsible, may advance money on bottomry to liquidate those demands (*z*): and a bottomry bond may, it seems, be given at the same time with, and as a collateral security for, bills of exchange for repairs and necessaries for the voyage, in this sense that, if the bills of exchange are honoured, the bottomry bond is discharged (*a*).

If, after a bond hypothecating the vessel has been entered into, the vessel becomes damaged, and puts into a foreign port for shelter, it cannot be sold by the master so as to extinguish the maritime

(*s*) *Wallace* v. *Fieldin*, 7 Moore, P. C. C. 398; *Duranty* v. *Hart*, 2 Moo. P. C. N. S. 289; *The Olivier*, 1 Lush. 484; *The Hamburg*, 32 L. J. Adm. 161.

(*t*) *Kleinwort & Co.* v. *The Cassa Maritima of Genoa*, 2 Ap. Cas. 156, P. C.

(*u*) *The Panama*, L. R. 3 P. C. 199; 39 L. J. Adm. 37.

(*x*) *The Edmond*, 30 L. J. Adm. 128.

(*y*) *The Reliance*, 3 Hag. 66.

(*z*) *The Wave*, 15 Jur. 518; *The Augusta*, 1 Dods. 283; *The Laurel*, 33 L. J. Adm. 17.

(*a*) *Stainbank* v. *Shepard*, 22 L. J. Ex. 341; *The Emancipation*, 1 Wm. Rob. 124.

lien; and, as the doctrine of constructive total loss does not apply to bottomry bonds, if the ship is found unseaworthy and sold, the bondholder will be entitled to a first charge on the proceeds (*b*). In the case of British ships, the certificate of registry is (see Add. on Torts, 5th ed., by Cave, pp. 490—492), the great evidence of title; and all bottomry bonds and hypothecations ought to be, and generally are, indorsed upon it; and no man should purchase a British ship, even in a foreign port, without seeing the certificate. It is the duty of purchasers of British ships in foreign ports to make strict inquiries and be especially careful to guard themselves against liens which adhere to the ship; and they cannot be safe in cases of sale by the master, unless recourse is had to a court of justice, and a decree is obtained for the sale of the vessel (*c*). A British consul in a foreign port is entitled, under certain circumstances of urgent necessity, when the master is dead, to hypothecate a vessel and cargo through the medium of a bottomry bond (*d*).

Lien on vessels causing damage.—The owner of a vessel damaged at sea by collision with another vessel has a lien upon the vessel causing the damage, which may be enforced in the Court of Admiralty by a proceeding *in rem* against the vessel, so that, if the vessel causing the damage is carried to a distant port, and sold to a *bonâ fide* purchaser without notice of the lien, the vessel may nevertheless be attached in the hands of such *bonâ fide* purchaser and sold to satisfy such damage. But this lien may be lost by negligence or delay, where the rights of third parties are thereby compromised (*e*). A maritime lien is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached (*f*). But no bottomry bondholder or mortgagee can be a competitor with a successful suitor in a cause of damage in the Admiralty Court. The lien of the latter will prevail over both the mortgage and the bottomry bond, unless the bottomry bond has been granted after the damage has been done.

Priority of maritime liens.—Where there were two bottomry bonds attaching on the vessel causing the damage, one entered into before, and the other after, the collision, it was held that the lien for the damage must be preferred to the lien of the first bondholder, but that it did not extend to the increased value of the vessel resulting from repairs effected at the cost of the second bondholder (*g*). Where several bottomry bonds have been given

(*b*) *The Great Pacific*, L. R. 2 P. C. 516; 38 L. J. Adm. 45.

(*c*) *The Catharine*, 15 Jur. 231.

(*d*) *The Cynthia*, 16 Jur. 748.

(*e*) *The Europa*, 2 Moo. P. C. N. S. 1.

(*f*) *Harmer* v. *Bell*, 7 Moore, P. C. 285.

(*g*) *The Aline*, 1 W. Rob. 120.

by the master at different periods during the voyage, those of the latest date have the priority of payment, on the supposition that the last bond operates for the protection of the prior interests (*h*). A bottomry bond also executed under the pressure of necessity at a foreign port will supersede a previous mortgage of the ship (*i*).

Hypothecation of cargoes and merchandise.—The master of a ship may, under the pressure of extreme necessity, and where he is unable to communicate with the owner (*k*), hypothecate the cargo as well as the ship, to enable him to raise funds to prosecute the voyage and deliver the goods at the port of destination. He is clothed with an implied authority to take whatever steps ought to be taken to protect them from impending destruction (*l*). But he can do no more than the owners themselves could if actually present; and he cannot sell against their will (*m*). He may create and continue a charge upon the cargo in favour of the lender of the money so long as such cargo remains in his possession; but he has no power to hypothecate it so as to enable the creditor to follow it after it has been sold or transferred (*n*). Where a ship, freight, and cargo were hypothecated at a foreign port by one bottomry bond for necessary repairs, and the plaintiff's goods formed part of the cargo so hypothecated, and the ship and freight realised less than the sum borrowed, and the goods became liable for the deficiency, and the plaintiff was compelled to pay it to release his goods, it was held that he might maintain an action against the shipowner for the recovery of the money he had been obliged to pay to release his cargo; also that the shipowner could not abandon the ship and freight, and refuse to ratify the act of the master, because the costs and expenses exceeded the value of the ship, when repaired, and the freight; and that "a merchant advancing money on bottomry in a foreign port, though bound to show a reasonable case of unprovided necessity for the advance, from the want of repair, or otherwise, is not bound to inquire into the expediency of incurring the expense of these repairs with reference to the interest of the owner" (*o*). By the French law, on the contrary, the shipowner in a similar case may abandon the ship and freight, and, if he does so, will not be liable to the shipper for money paid to release the cargo (*p*).

Illegal pledges.—By the Mercantile Shipping Act, 1854, s. 50,

(*h*) *The Betsy*, 1 Dods. 289; *The Rhadamanthe*, ib. 201.

(*i*) *The Duke of Bedford*, 2 Hag. 294.

(*k*) *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222.

(*l*) *The Gratitudine*, 3 Rob. 240.

(*m*) *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; *Acatos* v. *Burns*, 3 Ex. D. 282, C. A.

(*n*) *Busk* v. *Fearon*, 4 East, 319.

(*o*) *Duncan* v. *Benson*, 1 Exch. 537; *Benson* v. *Duncan*, 3 ib. 644.

(*p*) *Lloyd* v. *Guibert*, 6 B. & S. 100; L. R. 1 Q. B. 115; 33 L. J. Q. B. 241; 35 L. J. Q. B. 74; see *Greer* v. *Poole*, 5 Q. B. D. 272.

any pledge of the certificate of registry of a ship is made illegal and void; and, therefore, if a sole owner and captain pledges the certificate for good consideration, he may nevertheless re-demand the document for the purposes of navigation, and may maintain an action against the pledgee if it is not delivered up on request (q).

Mortgages of fixtures may be made through the medium of any instrument of conveyance in writing, and need not be by deed (r). If certain fixtures are enumerated in a mortgage-deed, and there is then a clause embracing all fixtures upon the premises, fixtures of all kinds will pass to the mortgagee (s). If the mortgagor makes default in payment of the mortgage-debt at the time appointed, the mortgagee may proceed to sell, without taking proceedings to foreclose, and may apply the proceeds of the sale in liquidation of the mortgage-debt, interest and costs (t). But he will be ordered to account for and pay over any surplus that may remain (u). If he does not think fit to sell, he can obtain a decree of foreclosure, and bar the equity of redemption, and make the property his own (x).

Right to fixtures as between mortgagor and mortgagee.—A mortgagor in possession may become tenant at will to the mortgagee, or tenant at sufferance; but he is not, in general, tenant for any term. The cases, therefore, respecting the right to disannex and remove fixtures as between landlord and tenant, have no application to the case of mortgagor and mortgagee. A mortgage made by the owner of the inheritance will, in general, pass all the fixtures thereon, though they are not named in the deed, and although they are trade fixtures which have been annexed to the freehold for the more convenient using of them and not to improve the inheritance, and are capable of being removed without any appreciable damage to the freehold (y). They pass to the mortgagee as part and parcel of the inheritance; and the mortgagor does not, by becoming tenant to the mortgagee, acquire any right to remove any portion of them, although they would be removable in ordinary cases as between landlord and tenant (z). Trade fixtures, affixed to mortgaged freehold premises after the mortgage by the mortgagor and his partner occupying the premises for the purpose of their trade, pass to the mortgagee (a).

(q) *Wiley* v. *Crawford*, 1 B. & S. 253; 30 L. J. Q. B. 319. See also Add. on Torts, 5th ed., by Cave, p. 491.

(r) *Thompson* v. *Pettit*, 10 Q. B. 101.

(s) *Haley* v. *Hammersley*, 30 L. J. Ch. 771.

(t) *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 2 Atk. 303.

(u) *Harrison* v. *Hart*, 1 Com. 393.

(x) *Wayne* v. *Hanham*, 9 Hare, 62.

) *Climie* v. *Wood*, L. R. 3 Ex. 257; Ex. 328; 37 L. J. Ex. 158; 38 *ib.* ; *Holland* v. *Hodgson*, L. R. 7 C. P. ; 41 L. J. C. P. 146.

) *Walmsley* v. *Milne*, 7 C. B. N. S. ; 29 L. J. C. P. 97; *Mather* v. *ver*, 2 Kay & J. 536; 25 L. J. Ch. ; *Haley* v. *Hammersley*, 30 L. J. Ch.

SECTION IV.

MORTGAGE, ETC., OF INCORPOREALS.

Mortgages of shares and stock in a public company may be effected by the execution by the mortgagor of the ordinary deed of transfer conveying the shares to the mortgagee in consideration of the payment of the mortgage-money, as in the case of an absolute sale, taking at the same time a separate deed from the mortgagee, admitting that the transfer, though absolute on the face of it, was in reality made by way of mortgage, and undertaking to re-transfer the shares by a given day on repayment by the transferror of the mortgage-money. If the transfer is on the face of it made conditional by way of mortgage, and not in the ordinary form of transfer given by the statute incorporating the company, the company will refuse to register it, as they cannot, as we shall see, place on the register transfers complicated with trusts and conditions (*a*). Foreclosure, and not sale, is the remedy of an equitable mortgagee of a share in a mining partnership (*b*).

If a person transfers his shares in a company by way of mortgage, and the mortgagee, as registered owner, becomes liable for calls or other payments, he cannot compel his mortgagor to indemnify him, unless he comes to redeem the shares (*c*).

Mortgages of stock and shares void by reason of reputed ownership.—If money is advanced on the security of a transfer of shares made by way of mortgage, and the transfer is not registered in the register of shareholders of the company, so that the mortgagor still appears on the register as the holder of the shares, the shares will be in his order and disposition, and, in case of his bankruptcy, will pass to his trustee, provided the legal power to transfer the shares still continued in the mortgagor; but, if the transfer cannot be made without the production of the mortgagor's certificates of proprietorship, and these certificates have been placed in the hands of the mortgagee so as to give the latter an equitable lien upon them, then, as the mortgagor has no power of transfer, the shares are not in his order and disposition (*d*).

Lien upon shares and stock.—Certificates of proprietorship of shares frequently have a notice at the foot of them, warning the

725; *Cullwick* v. *Swindell*, L. R. 3 Eq. 249; 36 L. J. Ch. 173; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

(*a*) *Post*, p. 1018; *Reg.* v. *General Cemetery Co.*, 6 Ell. & Bl. 415; 25 L. J. Q. B. 342.

(*b*) *Redmayne* v. *Forster*, L. R. 2 Eq. 467; 35 L. J. Ch. 847.

(*c*) Smith's Man. of Eq., 11th ed. p. 339.

(*d*) *Harrison, Ex parte*, 3 Deac. 196

shareholder that no transfer of his shares can be effected without the production of that certificate; and the companies refuse to register a transfer-deed, unless the certificates of proprietorship of the transferror have previously been deposited at the transfer office. If, therefore, a shareholder borrows money on the security of shares, and deposits his certificates in the hands of the lender, accompanied by an agreement, in writing, to transfer the shares to the lender, or to his nominee, in case of the non-payment of the money by the time appointed, there will be a good charge upon the shares (*e*); but notice of the deposit of the certificates should be given to the company, to prevent the shareholder from obtaining fresh certificates by perjury or fraud, and to do away with the inference of reputed ownership in case of the bankruptcy of the depositor in whose name the shares are registered, and so prevent the title to the shares from vesting in his trustee.

The fact that the company is not bound to take notice of any trust will not render a notice to them of the deposit of the certificates by way of security for a loan nugatory, and will not prevent a deposit of the certificates of proprietorship by way of security for a loan from constituting a valid charge upon the shares (*f*).

Where a sister advanced her brother 1800*l.* on the security of a deposit of mining shares belonging to the brother, and received the certificates of the shares, together with an undertaking, signed by the brother, to complete the transfer of the shares to the petitioner when required, and placed the certificates and the undertaking in an inclosure which she sealed with her seal, and then deposited it in an iron safe belonging to her brother for greater security, it was held that the certificates were not in his possession, order, or disposition at all. He had certainly the custody of the packet, but could not lawfully have broken the seal to get at the contents (*g*).

(*e*) *Richardson, Ex parte*, 3 Deac. 503; *Littledale, Ex parte*, 6 De G. M. & G. 730; *Stewart, Ex parte*, 34 L. J. Ch. 6.

(*f*) *Stewart, Ex parte, supra*, explaining and qualifying *Boulton, Ex parte*, 1 De G. & J. 763.

(*g*) *Ex parte Richardson*, 3 Deac. 503.

CHAPTER IV.

OF CONTRACTS OF INDEMNITY.

SECTION I.

PRINCIPAL AND SURETY.

Of the contract of suretyship.—The contract or undertaking of a surety is a contract by one person to be answerable for the payment of some debt, or the performance of some act or duty, in case of the failure of another person, who is himself primarily responsible for the payment of such debt, or the performance of the act or duty. To the contract and engagement of suretyship it is essential that there be a principal or third party primarily liable; for there can be no accessory without a principal (*a*). If, therefore, no contract has been entered into with the third party on whose account the covenantor or promisor professes to act as surety, no liability attaches to the latter, as he cannot be made primarily liable upon a contract by which he has expressly imposed upon himself only a secondary liability as surety. From the terms and language of some contracts, a doubt frequently arises as to whether the contract is the contract of a surety coming in aid only of a principal debtor or contractor, and undertaking a secondary liability upon the default of the principal, or whether it is the contract of a principal and sole contracting party stipulating for some benefit or advantage for a third party, who is not bound by the contract, and on whom no liability whatever attaches (*b*). When a man wishing to procure credit for his friend writes a letter to a shopkeeper, requesting him to supply such friend with goods, saying, "If *he* does not pay you, I will," the undertaking is the undertaking of a surety. If he says, "I will be answerable," or, "I will see you paid," the expressions are equivocal; and then we ought to look at the surrounding circumstances to see what the contract really was (*c*). If, upon examination of those circum-

(*a*) Pothier (Obl.), No. 446—449; Inst. lib. 3, tit. 21, s. 5.

(*b*) *Ante*, p. 167; *Spark* v. *Heslop*, 28 L. J. Q. B. 197; 1 El. & El. 563.

(*c*) Bayley, B., *Simpson* v. *Penton*, 2 Cr. & M. 433.

stances, it should appear that the party to whom the goods have been furnished has been treated as the debtor and principal contracting party: as, for example, if the credit has been given to him in the tradesman's books, and he has been applied to for payment: then the promisor can only be made liable as a surety after default on the part of such debtor and principal contracting party. If the promisor is himself interested in the subject-matter of the promise or the transaction to which it relates, he will stand in the position of a principal contracting party (*d*). But, where B. verbally promised that, if M. would supply C. with iron, and take C.'s acceptances, he would discount them, it was held that this was a promise to answer for the default of another, and that M. could not recover against B. on his refusing to discount the acceptances (*e*).

Authentication of guarantees.—According to the Roman civil law, the engagement of a surety could only be contracted by STIPULATION. By our own common law it might be contracted orally; but the legislature has thought fit to require the engagement to be authenticated by writing; and it has been enacted, as previously mentioned, by the fourth section of the Statute of Frauds (*ante*, pp. 166—169), that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the AGREEMENT upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorised. Formerly, if the guarantee or undertaking was made by simple contract or by writing not under seal, the cause or consideration for the promise, as well as the promise itself, must have been disclosed upon the face of the writing; but, by the 19 & 20 Vict. c. 97, s. 3, no special promise made by any person to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the person to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document. But parol evidence is not admissible to explain the promise; and, therefore, the whole promise must be in writing, or the memorandum will be insufficient (*f*). If the writing is so vague

(*d*) *Fitzgerald* v. *Dressler*, 5 Jur. N. S. 598; 29 L. J. C. P. 113.

(*e*) *Mallet* v. *Bateman* L. R. 1 C. P. 163; 35 L. J. C. P. 40.

(*f*) *Holmes* v. *Mitchell*, 7 C. B. N. S. 361; 28 L. J. C. P. 301.

and uncertain that the nature and extent of the undertaking and liability cannot be made out from the terms of the instrument, it will not constitute a sufficient memorandum of the promise (*g*). If, therefore, the name of the principal intended to be guaranteed is left out or left in blank, there is no sufficient memorandum of the contract (*h*).

The Statute of Frauds, as we have seen (*ante*, p. 166), does not apply to the case where the party giving the guarantee is himself liable to the demand which he is purporting to guarantee. The debt must be exclusively the debt, default, or miscarriage of another to bring it within the statute (*i*).

Primary and secondary liabilities.—When money is advanced, or goods are supplied, to a principal debtor, on the security of a joint and several covenant, or a joint and several promissory note, executed by the principal debtor and his sureties, for the re-payment of the money advanced or the due payment of the price of the goods, all the co-covenantors or co-promisors are primarily liable on the face of the instrument, and are bound to see that the money is paid on the day appointed for payment, so that, if default is made, they may be at once sued upon the instrument. Formerly, when two or more persons signed a joint and several promissory note as principals, it was not allowed, at common law, to modify the effect of the contract by showing that one of them signed only as surety for the other; but now the fact may be pleaded and given in evidence for the purpose of giving the party so signing the equitable rights of a surety, but not for the purpose of establishing a different contract from that evidenced by the writing, such as that a party who has contracted a primary obligation on the face of the contract was not intended to be primarily liable, but had agreed only to be secondarily liable after the default of another joint contractor (*k*).

Of the consideration when stated on the face of a guarantee—We have already seen that a bygone transaction cannot be made a good consideration for a promise (*ante*, p. 8); but, if there is a valid consideration in point of fact, the mere statement of it in the past tense on the face of a guarantee will not invalidate the contract. The consideration, if disclosed, need not be expressed in words of form, or with technical accuracy (*l*). The contract must be interpreted in connection with surrounding

(*g*) *Holmes* v. *Mitchell*, *ante*, p. 649.

(*h*) *Williams* v. *Lake*, 2 El. & El. 349; 29 L. J. Q. B. 1.

(*i*) *Orrell* v. *Coppock*, 26 L. J. Ch. 269; *ante*, pp. 166—169.

(*k*) *Pooley* v. *Harradine*, 7 Ell. & Bl. 431; *Greenough* v. *M'Clelland*, 2 Ell. & Ell. 424; 30 L. J. Q. B. 15; *Manley* v. *Boycot*, 2 Ell. & Bl. 46; 22 L. J. Q. B. 265; *Mut. Loan Fund, &c.*, v. *Sudlow*, 5 C. B. N. S. 453, 28 L. J. C. P. 108; *Lawrence* v. *Walmsley*, 12 C. B. N. S. 809; 31 L. J. C. P. 143.

(*l*) *Pace* v. *Marsh*, 8 Moore, 59; *Boehm* v. *Campbell*, 3 Moore, 15; *Oldershaw* v. *King*, 2 H. & N. 519; 27 L. J. Ex. 120.

circumstances, in order to ascertain whether it was intended to apply to past or to future transactions; and, in case of doubt and ambiguity, it would seem that parol evidence is admissible to show that the parties meant, not a past, but a future transaction (*m*); and the courts will lean in favour of such a construction as will uphold and maintain the contract rather than render it nugatory and of no effect (*n*). Thus, where the defendant gave to the plaintiffs the following guarantee: "As Mr. D. informs me you require some person as guarantee for goods supplied to him by you in his business, I have no objection to act as such for payment of your account," it was held that the expression "for goods supplied" did not necessarily import a past transaction, and ought to be read "for goods to be supplied" (*o*). If the consideration was a future valid consideration, and not a past transaction, the guarantee will be upheld as a valid instrument (*p*). But, if there are no future advances, and the instrument, construed in connection with surrounding circumstances, does not show a future consideration, but refers altogether to a past transaction, it is invalid (*q*). If there is any consideration for a guarantee, the court will not take notice of its inadequacy (*r*). An indorsement on a contract of a guarantee or undertaking for the faithful performance of the contract by one of the contracting parties may be read in connection with the contract, in order to ascertain and establish the consideration (*s*).

Proposals and offers to guarantee not amounting to a concluded contract.—Care must be taken in all cases to mark the distinction between a consummate and perfect guarantee, and a mere proposal, or offer, or tender of a guarantee, which must be accepted, and the acceptance notified to the maker, and his final assent to the engagement be obtained, ere it can become a perfect and concluded contract. Where the defendant wrote a letter to the plaintiffs to the following effect:—"Gentlemen,—As I understand Messrs. Anderson and Co. have given you an order for rigging, &c., which will amount to about 4000*l.*, I can assure you, from what I know of their honour and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guarantee you against any loss from giving them this credit;" and this letter was given by the defendant to Anderson and Co., who handed it over to the plaintiffs, and the latter thereupon furnished

(*m*) *Hoad* v. *Grace*, 7 H. & N. 494; 31 L. J. Ex. 98.

(*n*) *Broom* v. *Batchelor*, 1 H. & N. 263; 25 L. J. Ex. 299.

(*o*) *Hoad* v. *Grace*, 7 H. & N. 494; 31 L. J. Ex. 98.

(*p*) *Bainbridge* v. *Wade*, 16 Q. B. 99; 20 L. J. Q. B. 7; *Steele* v. *Hoe*, 19 *ib.* 89; *Edwards* v. *Jevons*, *ib.* C. P. 50; 8 C. B. 436; *Colbourn* v. *Dawson*, 20 L. J. C. P. 154; 10 C. B. 773; *Brooks* v. *Haigh*, 10 Ad. & E. 334.

(*q*) *Bell* v. *Welch*, 9 C. B. 168; 19 L. J. C. P. 184; *Allnutt* v. *Ashenden*, 6 Sc. N. R. 133; *Westhead* v. *Sproson*, 30 L. J. Ex. 265; 6 H. & N. 728.

(*r*) *Dutchman* v. *Tooth*, 7 Sc. 710.

(*s*) *Coldham* v. *Showler*, 2 C. B. 312.

the rigging and other articles, and, being unable to procure payment from Anderson and Co., brought an action against the defendant, it was held that the letter did not import a perfect and conclusive guarantee, but only a proposition tending to a guarantee; that it was a mere overture or offer; and that, if the plaintiffs had accepted it, and intended to treat it as a guarantee, they ought to have given notice to the defendant (*t*). So, where an action was brought upon a letter addressed to the plaintiffs in the following terms: "Gentlemen,—Mr. France informs me that you are about publishing an arithmetic for him and another person; and I have no objection to being answerable as far as 50*l*. For my reference, apply to Messrs. Brooke and Co. of this place:" which letter had been signed by the defendant, and given to Mr. Brooke, and forwarded by him to the plaintiffs, who proceeded with the publication without ever communicating with the defendant, it was held that the transaction "could not be tortured into a consummate and perfect contract;" that it was a mere offer or proposal, requiring an answer; and that, as the plaintiffs had not communicated their acceptance of it to the defendant before they proceeded to act upon it, they could not treat it as an absolute and conclusive engagement capable of sustaining an action (*u*).

If references are required from, and given by, an intended surety, and the creditor means to dispense with the references, and act upon the guarantee without them, he is bound to give notice to the surety of the intended renunciation before he acts upon the guarantee (*x*).

Conditions precedent.—When the liability of the surety attaches only on the happening of some precedent act or event, it must be fully established that the event has happened (*y*).

Bonds to secure faithful services.—If the surety has bound himself by a penal obligation under seal for the performance of some contract, act, or duty, by his principal, and the time for which the surety is to be bound is marked out in the recitals or condition, it cannot afterwards be extended by any general words. If the recital sets forth the appointment of the party, on whose behalf the surety consents to become bound, to some office or employment, and the condition of the bond is for the good conduct and faithful service of the party in such office or employment, the liability of the surety will be co-extensive with the duration of the office; if the office is an annual office, the liability will not extend

(*t*) *M'Iver* v. *Richardson*, 1 M. & S. 557.

(*u*) *Mozley* v. *Tinkler*, 1 C. M. & R. 692.

(*x*) *Morten* v. *Marshall*, 2 H. & C. 305; 33 L. J. Ex. 54.

(*y*) *Moor* v. *Roberts*, 3 C. B. N. S. 841.

beyond the current year of office (z); if it is a fixed and permanent employment for the life of such party, the liability of the surety will continue during the whole of the life of the latter; if, on the other hand, the duration is uncertain, as, for instance, if it is holden at the will of the employer, the liability will be as indefinite and uncertain as the time of the employment (a). Moreover, if a bond is given to secure the faithful services of the principal in one office or employment at a specified salary, it will not extend to a different office or employment at the same salary, or to the same office at a different and reduced salary (b); and a surety who becomes responsible for the good conduct of his principal as a clerk, will not be bound for him if he is afterwards employed as "a manager" (c). But there must be a substantial change in the office or employment, or the surety will not get rid of his liability (d). In an action upon a bond to secure the faithful service of a deputy-postmaster, it appeared by the recitals of the bond that the postmaster-general had deputed Jenkins to be deputy-postmaster "for the term of six months following," and the condition was, that Jenkins should, during all the time he continued deputy-postmaster, faithfully and diligently perform and execute the duties of the office; and it was held that the liability of the surety was restricted to the six months specified in the recitals (e). And, although the recital of a bond, setting forth the appointment of the principal to a certain office or employment, does not state the nature or duration of the office, or in any way limit the period of the service for the honest and faithful performance of which the surety binds himself, yet, if the office is in point of fact an annual office, and there is a fresh deputation and appointment each year, the surety is only answerable for the execution of the duty for the current year (f).

Extent and duration of the liability of the surety.—If the surety by express words plainly manifests an intention to be bound for the faithful service and good conduct of the party, not only for the current year of office, but for all succeeding years under any fresh appointment, the obligation will continue in force as long as the obligee may think fit to continue the employ-

(z) *Mayor, &c., of Cambridge* v. *Dennis*, 27 L. J. Q. B. 474.

(a) *Mayor of Dartmouth* v. *Silly*, 7 Ell. & Bl. 97; 26 L. J. Q. B. 90.

(b) *North-West. Ry. Co.* v. *Whinray*, 10 Exch. 77; 23 L. J. Ex. 261; *Holland* v. *Lea*, 9 Exch. 430; *Frank* v. *Edwards*, 8 Exch. 220; 22 L. J. Ex. 42.

(c) *Anderson* v. *Thornton*, 3 Q. B. 276; *Whitcher* v. *Hall*, 5 B. & C. 276.

(d) *Portsea Isl. Un. (Guard.)* v. *Whillier*, 29 L. J. Q. B. 150; 2 El. & El. 755.

(e) *Arlington* v. *Meyricke*, 2 Wms. Saund. 411, a.; *Stoughton* v. *Day*, Al. 10; Sty. 18; *Bamford* v. *Iles*, 3 Exch. 380; *Liv. Water Co.* v. *Atkinson*, 6 East, 512.

(f) *Hassell* v. *Long*, 2 M. & S. 363; *Peppin* v. *Cooper*, 2 B. & Ald. 431; *Wardens of St. Saviour's* v. *Bostock*, 2 B. & P. N. R. 180; *Leadley* v. *Evans*, 9 Moore, 102; *Lond. Ass. Co.* v. *Bold*, 6 Q. B. 526; *Cambridge, Mayor, &c.*, v. *Dennis*, 27 L. J. Q. B. 475.

ment (*g*). Thus, where a bond reciting the appointment of the principal to an office was conditioned for the due fulfilment by him of the duties thereof, "during such time as he shall continue in the said office, whether by virtue of his said appointment, or of any re-appointment thereto," it was held that the obligation was not confined to the current year of office, but extended to all subsequent years during which the party was continually re-appointed (*h*). And the surety may, by the terms of an express contract under seal, render himself responsible for past, present, and future receipts and payments, and preceding debts and defaults, as well as those that are to come (*i*). And, if the duration of the office or employment to which the party is stated to have been appointed is indefinite and uncertain—if, for example, it is held or continues *durante bene placito*, and there is nothing in the language of the recital or of the condition directly or indirectly limiting the period of liability, the extent and duration of the obligation of the surety are then as indefinite and uncertain as the period of employment, and will continue as long as the employment lasts, though it should be for the whole life of the principal or party employed (*k*).

Release of the surety.—The civil and continental laws enable the surety, when no time at all is marked out by the contract for the termination of his liability, to release himself by process of law after a reasonable period from the time of the making of the contract (*l*). In our own law, the surety has no such means of discharging himself from the liability he has voluntarily undertaken (*m*); and the courts, therefore, in all cases construe doubtful contracts of suretyship (when they are under seal and the surety has no power of revoking them) in favour of the surety, so as to narrow rather than enlarge his liability.

Discharge of the surety by a change in the service or employment of the principal.—In the case of a guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiffs, that course of dealing is part of the essence of the contract with the surety, so that, if it be altered, the surety is discharged (*n*); but, if the course of dealing is left to the option of the plaintiffs entirely, or within certain limits, the surety cannot then complain of a variation to which he has

(*g*) *Berwick, Mayor of,* v. *Oswald*, 3 Ell. & Bl. 653; *Oswald* v. *Berwick, &c.*, 5 H. L. C. 856.

(*h*) *Augero* v. *Keen*, 1 M. & W. 390.

(*i*) *Saunders* v. *Taylor*, 9 B. & C. 35, 41.

(*k*) *Curling* v. *Chalklen*, 3 M. & S. 509; *M'Gahey* v. *Alston*, 1 M. & W. 386.

(*l*) Pothier (OBLIGATIONS) Nos. 442, 443.

(*m*) But see as to this *Burgess* v. *Eve*, L. R. 13 Eq. 450; 41 L. J. Ch. 515; *Phillips* v. *Foxhall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

(*n*) *Arlington (Lord)* v. *Merricke*, 2 Saund. 403.

agreed (o). Where there is a bond of suretyship for the faithful execution of the duties of a public office, and, by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided (p). But, where a principal is appointed to two distinct employments, and his sureties guarantee by one bond his good conduct in both, they are not discharged from liability as to one of the employments by the fact of his duties being altered and enlarged in the other, or as to either by the fact that an additional and distinct office is undertaken (q). Where the condition of a bond was that a clerk should account for and pay over to the obligee, his executors or administrators, all monies, bills, &c., which he should receive in the course of his employment as clerk to the obligee, it was held that the liability of the surety ceased with the death of the obligee, and could not be extended to a new employment by the executors (r). And, where the condition of the bond was that a clerk should, during the time he continued in the service of the plaintiff, faithfully account for and pay over all monies which he should receive belonging to the plaintiff, and the breach assigned was the non-payment by the clerk of money which he had received on account of the plaintiff and his partner, it was held that this was beyond the scope of the defendant's engagement (s).

Bonds and guarantees under seal to partnerships and associations.—If a bond be given to secure the faithful services of a clerk to a firm in partnership, or the repayment of advances made by the firm, and any change takes place in the constitution of the co-partnership, either by the death or retirement of existing partners, or the accession of new partners, the contract of suretyship is at an end, unless it appears to have been the intention of the contracting parties that the security should be a continuing security, and should remain in force throughout all changes in the co-partnership (t). This was held to be the case where a bond was given by a surety to the several partners of a banking house *nominatim* to secure the repayment to them, "or either of them," of advances to be made "by them" to the principal (u). This

(o) *Stewart* v. *M'Kean*, 10 Exch. 689; 24 L. J. Ex. 145.

(p) *Pybus* v. *Gibb*, 6 Ell. & Bl. 911; 26 L. J. Q. B. 41.

(q) *Skillett* v. *Fletcher*, L. R. 1 C. P. 217; *ib.* 2 C. P. 469; 35 L. J. C. P. 154; 36 L. J. C. P. 206.

(r) *Barker* v. *Parker*, 1 T. R. 287, 295.

(s) *Wright* v. *Russell*, 3 Wils. 530; 2 W. Bl. 934; *Napier* v. *Bruce*, 8 Cl. & Fin. 470; *Montefiore* v. *Lloyd*, 15 C. B. N. L. 203; 33 L. J. C. P. 49.

(t) *Bellairs* v. *Ebsworth*, 3 Campb. 52; *Chapman* v. *Beckington*, 3 Q. B. 703; *Lond. Ass. Co.* v. *Bold*, 6 *ib.* 524; *Mills* v. *Guard, &c.*, 18 L. J. Ex. 252; *Montefiore* v. *Lloyd*, 15 C. B. N. S. 203; 33 L. J. C. P. 49; *Barclay* v. *Lucas*, 3 Doug. 321.

(u) *Strange* v. *Lee*, 3 East, 489; *Weston* v. *Barton*, 4 Taunt. 673; *Dance* v. *Girdler*, 4 B. & P. 34.

principle of construction, narrowing the liability of the surety, applies with still greater force in the case of bonds conditioned for the re-payment of advances to be made to a firm, or to either of the partners. Where, therefore, a surety becomes bound for the re-payment of advances made to two persons in partnership, or to either of them, and one dies, the liability of the surety will not extend to advances made to the survivor (*x*). If the liability of the surety is intended to continue after the retirement as well as the death of one of several persons in partnership, such intention must be manifested with a precision not to be mistaken (*y*). By the 19 & 20 Vict. c. 97, s. 4, which is simply an affirmance of the law as it previously stood (*z*), it is enacted, that no promise to answer for the debt, default, or miscarriage of another made to a firm, and no promise to answer for the debt, default, or miscarriage of a firm, shall be binding on the person making the promise in respect of anything done, or omitted to be done, after a change in any one or more of the persons constituting the firm, unless the intention of the parties that such promise shall continue to be binding, notwithstanding such change, shall appear, either by express stipulation or by necessary implication (*a*).

Limitation of the liability of the surety.—If a bond or guarantee is given by a surety to secure the re-payment of advances of money to the principal, provided such advances do not exceed in the whole, at any one time, a certain limited amount, the proviso protects the surety from being answerable beyond the amount named, but does not render the obligation void if the advances go beyond it (*b*), unless that clearly appears to have been the intention of the parties (*c*). A guarantee to secure monies to be advanced to a third party on discount, "for the space of twelve calendar months," is countermandable within that time although some bills may have been discounted and repaid before notice (*d*). Where a surety gives a continuing guarantee limited in amount to secure the *floating balance* which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not *primâ facie* to be

(*x*) *Simson* v. *Cooke*, 8 Moore, 605.

(*y*) *Un. Camb.* v. *Baldwin*, 5 M. & W. 580, 586; *Backhouse* v. *Hall*, 6 B. & S. 507; 34 L. J. Q. B. 141.

(*z*) *Backhouse* v. *Hall*, 6 B. & S. 507; 34 L. J. Q. B. 141.

(*a*) *Myers* v. *Edge*, 7 T. R. 254; *Dry* v. *Davy*, 10 Ad. & E. 30.

(*b*) *Seller* v. *Jones*, 16 M. & W. 112; *Gee* v. *Pack*, 33 L. J. Q. B. 49; *Backhouse* v. *Hall*, 6 B. & S. 507; 34 L. J. Q. B. 141.

(*c*) *Parker* v. *Wise*, 6 M. & S. 246; *Gordon* v. *Rae*, 8 Ell. & Bl. 1082.

(*d*) *Offord* v. *Davis*, 12 C. B. N. S. 748, 31 L. J. C. P. 319.

construed as a security for part of the debt only. It is a question of construction for the Court (*e*). Where the wife guaranteed as follows: "In consideration of you having at my request agreed to supply goods to my husband, I do hereby guarantee you the sum of £500," it was held to guarantee the payment of goods supplied after the date of the guarantee only (*f*).

Continuing liabilities.—Where a bond, given by the defendant as surety, recited that the plaintiffs had agreed to advance to the principal "any sums of money not exceeding, at any one or more time or times, the sum of 200*l.* in the whole," and the bond was conditioned for the payment by the defendant as surety, of "all and every such sum or sums of money, not exceeding the sum of 200*l.* as aforesaid," as the plaintiffs should advance, it was held that this bond was a continuing or standing security, not confined to the first 200*l.* advanced, but extending to all future advances and payments that might at any time be made by the plaintiffs (*g*). The courts, however, in the case of contracts of suretyship under seal, lean in favour of a construction limiting the liability of the surety to some particular supply or advance, so as to confine it within an ascertained definite limit, rather than extending it to a general and continuous supply, creating an indefinite liability, from which the surety might have no means of relieving himself during the whole life of the principal (*h*). In the case of simple contracts, on the other hand, no such leaning is found. Thus, where the defendant gave to the plaintiff a guarantee for the payment of "any goods he hath or may supply W. P. to the amount of 100*l.*," it was held that the guarantee was a continuing or standing guarantee, extending to all supplies of goods at any time furnished, so long as the parties continued to deal together (*i*). So, where the guarantee was, "In consideration of your supplying my nephew with earthenware and china, I hereby guarantee the payment of any bills you may draw upon him on account thereof to the amount of 200*l.*," it was held to be a continuing guarantee, remaining as a standing security to the amount specified, so long as the supply of earthenware lasted (*k*). From a continued liability under seal the surety has no means of escape at common law; he cannot recal the bond, covenant, or obligation, that he has entered into, and say that he will be no longer responsible for advances or supplies to the principal, unless in the contract of suretyship he has expressly

(*e*) *Ellis* v. *Emmanuel*, 1 Ex. D. 157, C. A.

(*f*) *Morrell* v. *Cowan*, 7 Ch. D. 151, C. A.

(*g*) *Batson* v. *Spearman*, 6 Ad. & E. 298.

(*h*) *Kirby* v. *Duke of Marlborough*, 2 M. & S. 22.

(*i*) *Mason* v. *Pritchard*, 12 East, 227.

(*k*) *Mayer* v. *Isaac*, 6 M. & W. 612; *Hitchcock* v. *Humfrey*, 6 Sc. N. R. 549; *Horlor* v. *Carpenter*, 27 L. J. C. P. 1.

reserved to himself such a power (*l*); and his liability may be prolonged indefinitely, and for the whole life of the principal. But, in the case of simple contracts, the surety (though liable for all advances and supplies that have been made on the faith of his promise) may at any time revoke such promise, and discharge himself from the future and continuing liability by giving notice to that effect.

The following guarantees have been held to import a continuing liability: "I consider myself bound for any debt A. B. may contract with you in his business not to exceed 100*l*." (*m*); "I undertake to be answerable to the extent of 100*l*. for any tallow supplied by you to A. B." (*n*); "I hereby agree to guarantee the payment of goods to be delivered in umbrellas to S. & Co., according to the custom of their trading with you in the sum of 200*l*." (*o*); "As an inducement to you to sell W. C. goods and continue your dealings with him, I hereby undertake to guarantee you in a sum of 100*l*. payable to you in default on the part of the said W. C. for two months" (*p*); "In consideration of your agreeing to supply goods to K., we agree to guarantee any future debt with you to the amount of 600*l*." (*q*); "In consideration of the credit given by the H. G. C. Co. to my son, for coal supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of 100*l*.; and, in default of his payment of any accounts due, I bind myself by this note to pay to the H. G. C. Co. whatever may be owing, to an amount not exceeding the sum of 100*l*." (*r*).

Guarantees not importing a continuing liability.—The following guarantees have, on the other hand, been held to limit the liability of the surety to one solitary transaction, or to a particular course of dealing to a certain amount, and to be discharged or extinguished as soon as supplies or advances to the amount named have been made, and paid for or satisfied by the principal: "I engage to guarantee the payment of A. M. to the extent of 60*l*. at quarterly account, bill two months, for goods to be purchased by him of you" (*s*); "I agree to be answerable to K. for the amount of five sacks of flour, to be delivered to W. P., payable in one month" (*t*); "I agree to be answerable for the payment of 50*l*. for T. L., in case he does not pay for the gin he receives from

(*l*) *Hassell* v. *Long*, 2 M. & S. 370; *Calvert* v. *Gordon*, 1 M. & R. 497; 3 M. & R. 124.

(*m*) *Merle* v. *Wells*, 2 Camph. 413.

(*n*) *Bastow* v. *Bennett*, 3 Camph. 220.

(*o*) *Hargrave* v. *Smee*, 3 M. & P. 573.

(*p*) *Allan* v. *Kenning*, 2 M. & S. 768.

(*q*) *Martin* v. *Wright*, 6 Q. B. 917.

(*r*) *Wood* v. *Priestner*, L. R. 2 Ex. 66, 282; 36 L. J. Ex. 42, 127; see for other cases of continuing guarantees, *Heffield* v. *Meadows*, L. R. 4 C. P. 595; 38 L. J. C. P. 290; *Laurie* v. *Scholefield*, L. R. 4 C. P. 622; 39 L. J. C. P. 63; *Coles* v. *Pack*, L. R. 5 C. P. 65; *Nottingham Hide, Skin & Fat Market Co.* v. *Bottril*, L. R. 8 C. P. 694; 42 L. J. C. P. 256.

(*s*) *Melville* v. *Hayden*, 3 B. & Ald. 593.

(*t*) *Kay* v. *Groves*, 6 Bing. 276.

you" (u). Where the guarantee was, "In consideration of your supplying Mr. S. with goods to the extent of 100*l*., I undertake to pay you if he does not," it was held that the liability of the surety was dependent upon credit to the amount of 100*l*. being given if required, but that, if the debtor did not demand 100*l*. worth of goods, the surety would be liable for whatever was supplied (x). But, where the surety guarantees only the payment of one sum *in solido*, provided goods to the amount guaranteed are furnished, there is no cause of action against the surety until the full amount has been supplied (y).

Conditions precedent to the liability of the surety.—If the continued liability of the surety is made dependent upon the observance of certain terms and conditions by the creditor, these terms must be strictly obeyed, or the surety will be discharged (z). Therefore, where the creditor took a warrant of attorney from the principal debtor with a stipulation for the benefit of the surety that, on notice from the latter, the creditor should enter up judgment and levy execution upon the warrant of attorney, and apply the proceeds in reduction of the debt, and the creditor neglected to file the warrant of attorney, and to keep it up as an efficient security, it was held that the surety was discharged (a). Where a party has consented to be co-surety with another, he cannot be made responsible if the other party refuses or neglects to be bound. Where, therefore, one of two intended co-sureties executed a deed of covenant for the repayment of advances to be made to the principal debtor, on the understanding that the money would not be advanced until the deed was executed by the other surety, and the deed never was executed by the other surety, it was held that the executing surety was entitled in equity to be discharged from every part of the debt (b). But a surety, who has executed a bond on the faith of its being executed by the principal debtor also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed an instrument on which the surety may sue him and become a specialty creditor of his (c).

Duty of the person guaranteed.—Where the person guaranteed does any act injurious to the surety, or inconsistent with his rights, or omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be

(u) *Nicholson* v. *Paget*, 1 C. & M. 48.

(x) *Dimmock* v. *Sturla*, 14 M. & W. 758; 15 L. J. Ex. 65.

(y) *Johnson* v. *Gandy*, 26 Law T. R. 72.

(z) *Watts* v. *Shuttleworth*, 5 H. & N. 235; 29 L. J. Ex. 234; *Lawrence* v. *Walmsley*, 12 C. B. N. S. 808; 31 L. J. C. P. 143.

(a) *Watson* v. *Alcock*, 22 L. J. Ch. 858; 17 Jur. 853.

(b) *Evans* v. *Bremridge*, 8 D. M. & G. 100; 25 L. J. Ch. 334; *Bonser* v. *Cox*, 4 Beav. 379.

(c) *Cooper* v. *Evans*, L. R. 4 Eq. 45; 36 L. J. Ch. 431.

discharged (d). Thus, in the cases of bonds and guarantees given to an employer to secure the faithful services of a clerk or servant in his employment, the surety has a right to expect from the employer that he will call upon such clerk or servant to account in the ordinary course of business, and that he will not trust him beyond the bounds of ordinary prudence (e). But the mere passive inactivity of the principal to whom a guarantee has been given, or his neglect to call the principal debtor to account, and to enforce payment against him, do not discharge the surety; there must be some positive act done to the prejudice of the surety, or such a degree of negligence as to imply connivance, and amount to fraud. The surety guarantees the honesty of the person employed and is not entitled to be relieved from his obligation because the employer fails to use all the means in his power to guard against the consequences of dishonesty (f). If, however, the master discovers that the person employed has been guilty of dishonesty, he must inform the surety, who has thereupon a right to withdraw from his guarantee (g); and, if he omits so to do, the surety will be discharged so far as subsequent acts of dishonesty are concerned (h).

Alteration of the principal obligation discharging the surety.—If a new contract is substituted in the place of the original contract, or if the original contract is altered in any material point without the surety's consent, so as to constitute a new agreement varying substantially from the former, the surety is no longer bound (i). But, where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other (k). Where the defendant had as surety signed a joint and several promissory note with the principal debtor, having no reason to suppose that any one else was to sign it, and afterwards the payee, without the knowledge of the defendant, induced another person to sign it in order to strengthen the security, it was held that the defendant was discharged from liability (l). If the guarantee is a

(d) *Watts* v. *Shuttleworth*, 29 L. J. Ex. 234; 5 H. & N. 235.

(e) *Smith* v. *Bank of Scotland*, 1 Dow, 292.

(f) *Black* v. *The Ottoman Bank*, 15 Moo. P. C. 472.

(g) *Burgess* v. *Eve*, L. R. 13 Eq. 450; 41 L. J. Ch. 515.

(h) *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; *Sanderson* v. *Aston*, L. R. 8 Ex. 73; 42 L. J. Ex. 64.

(i) *Whitcher* v. *Hall*, 5 B. & C. 276; *Bonar* v. *Macdonald*, 3 H. L. C. 239; *Gen. St. Nav. Co.* v. *Rolt*, 6 C. B. N. S. 550; *Polak* v. *Everitt*, 1 Q. B. D. 669.

(k) *Harrison* v. *Seymour*, L. R. 1 C. P. 518; 35 L. J. C. P. 264.

(l) *Gardner* v. *Walsh*, 5 E. & B. 83; 24 L. J. Q. B. 284, overruling *Catton* v. *Simpson*, 8 Ad. & E. 136; see also *Holme* v. *Brunskill*, 3 Q. B. D. 495.

guarantee of the honesty and good conduct of the principal in any particular course of dealing with the plaintiff, that course of dealing is part of the agreement of the plaintiff with the surety, and the plaintiff cannot alter it and keep the surety liable. But, when the course of dealing is left to the option of the plaintiff altogether, or within certain limits, and is allowed by the contract, the surety cannot complain of an alteration which he has himself permitted (*ante*, p. 654).

Extension of the time of payment.—If a man becomes surety for the payment of a debt secured by the bond of the debtor, payable at a given day, and the creditor, before the day of payment has arrived, by an indorsement under seal on the bond, extends the time of payment, this is a material variation, amounting to the substitution of a new engagement in the place of the original contract, for the performance of which the surety is not bound (*m*). Any enlargement of the time of payment by a binding contract with the principal debtor which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, discharges the surety, if it has been made without his assent or authority, inasmuch as the situation of the surety is varied and his liability prolonged beyond what was originally contemplated (*n*). As soon as the principal debtor has made default, the surety has a right to step in and pay the debt, and require the creditor to sue, or allow him to sue, the principal in his, the creditor's name; and, if the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue the principal debtor, he thereby discharges the surety (*o*). But a contract with a stranger to give time to the principal debtor, which contract does not prevent the surety from discharging the debt and pursuing his remedy over against the principal debtor, will not discharge such surety from liability (*p*); and it must be proved that there was either a new security given to extend the time of payment, or a binding agreement upon sufficient consideration to suspend the remedy (*q*). If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal without the consent or knowledge of the surety, the surety is

(*m*) *Rees* v. *Berrington*, 2 Ves. 542.

(*n*) *Combe* v. *Woolfe*, 8 Bing. 162; 1 M. & Sc. 241; *Eyre* v. *Bartrop*, 3 Mad. 221; *Nisbet* v. *Smith*, 2 Br. C. C. 578; as to guarantees authorising the giving time to the principal debtor, see *Cowper* v. *Smith*, 4 M. & W. 519; *Un. Bank of Manch.* v. *Beech*, 3 H. & C. 672; 34 L. J. Ex. 133.

(*o*) Williams, J., *Strong* v. *Foster*, 17 C. B. 219; *Bailey* v. *Edwards*, 34 L. J. Q. B. 45; 4 B. & S. 761; *The Oriental Financial Corporation* v. *Overend, Gurney, & Co.*, L. R. 7 Ch. 142; 41 L. J. Ch. 332.

(*p*) *Frazer* v. *Jordan*, 8 Ell. & Bl. 312.

(*q*) Parke, B., *Moss* v. *Hall*, 5 Exch. 50; *Bingham* v. *Corbitt*, 34 L. J. Q. B. 37.

discharged (r). The mere giving of additional security by the principal to the creditor is not of itself a giving of time by the creditor to the principal (s).

There is no obligation of active diligence against the principal debtor on the part of the creditor. It is the business of the surety to see that the principal pays, not that of the creditor (t). A mere promise, therefore, without consideration, not to sue the principal debtor for a certain time will not discharge the surety (u), nor mere laches, or forbearance, or an omission on the part of the creditor, promisee, or obligee, to press the debtor or party liable, and sue him for the money, without any suspension of the legal remedies (x). Nor will a parol agreement to enlarge the time of payment discharge the surety, when the principal obligation is under seal, inasmuch as such parol agreement cannot in any way alter or affect the legal operation of the deed, or restrict or suspend the right of action thereon; neither will the acceptance by the creditor of a collateral security from the principal debtor operate as a discharge of the surety, if the position of the latter has in nowise been altered or varied thereby (y); nor will the surety be discharged, if he himself has assented to the alteration of the principal obligation. In the case of an accommodation bill, known to be such to all the parties, the acceptor can only be considered a surety for the drawer, so that, if time be given to the drawer by a binding agreement, without the knowledge and concurrence of the acceptor, the acceptor is discharged (z).

R. and H. being partners, consigned goods to China, and the money was remitted to the plaintiffs, and R. and H. drew bills on them whether sufficient money was remitted or not, and plaintiffs accepted fresh bills to enable them to take up their former acceptances, and so give time to R. and H. R. and H. discontinued partnership, of which plaintiffs had notice. Plaintiffs renewed some bills by accepting new bills of H. It was held that R. was not a surety but remained a principal with H. and was not discharged by the giving of time to H. (a).

Proof of suretyship where the relation does not appear upon the face of the contract.—The doctrine of discharge by giving time is not confined to cases where the relation of suretyship

(r) *Liquidators of Overend, Gurney, & Co.* v. *Liquidators of Oriental Financial Corporation*, L. R. 7 H. L. 348.

(s) *Liquidators of Overend & Gurney* v. *Liquidators of Oriental Corp.*, *supra.*

(t) *Wright* v. *Simpson*, 16 Ves. 734; Jervis, C. J., *Strong* v. *Foster*, 17 C. B. 216.

(u) *Tucker* v. *Laing*, 2 K. & J. 749.

(x) *Orme* v. *Young*, Holt, 84; *Lond. Ass. Comp.* v. *Buckle*, 4 Moore, 153; *Goring* v. *Edmonds*, 6 Bing. 91; *Dawson* v. *Lawes*, 23 L. J. Ch. 434.

(y) *Twopenny* v. *Young*, 3 B. & C. 210; *Bell* v. *Banks*, 3 Sc. N. R. 503.

(z) *Laxton* v. *Peat*, 2 Campb. 186; *Bailey* v. *Edwards*, 4 B. & S. 761; 34 L. J. Q. B. 41.

(a) *Swire* v. *Redman*, 1 Q. B. D. 536.

appears on the face of the original contract between the creditor, the principal, and the alleged surety (b). The equity arises from the relation of the co-obligors, or co-promisors *inter se*, and on the knowledge by the creditor of the existence of that relation (c). It is held to be inequitable in the creditor knowingly to prejudice the rights of the surety, although he may know of the existence of the relation of suretyship only at the time of his dealing with the principal debtor so as to prejudice such rights (d). But extraneous evidence is not admissible for the purpose of showing that a party who, on the face of the contract, has incurred a primary liability, was only intended to be secondarily liable as a surety after the default of another principal contracting party (e).

Effect of giving time to the principal debtor with reserve of remedies against the surety.—If, after the principal debtor has made default, and the surety has become liable to the payment of the debt, the creditor, by a binding contract, agrees to give his principal debtor time for payment, and in the same contract expressly stipulates for the reservation of all his remedies against the surety, the latter will still remain liable, notwithstanding the arrangement between the principal and the creditor (f). "The reserve of remedies," observes Parke, B., "has that effect upon this principle; first, it rebuts the implication that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and, secondly, it prevents the rights of the surety against the principal debtor being impaired, the injury to such rights being the other reason; for the principal debtor cannot complain if, the instant afterwards, the surety enforces those rights against him; and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him" (g). And, if a security is taken which, by extending the time of payment would operate to release the surety, the creditor may prove by parol evidence that an agreement was come to between the creditor and the principal debtor that the transaction should not have that effect, and may thus keep alive the liability of the surety (h).

In the French law, and also in the civil law, an enlargement

(b) *Rayner* v. *Fussey*, 28 L. J. Ex. 132.

(c) *Davies* v. *Stainbank*, 6 De Gex, M. & G. 696; *The Oriental Financial Corporation* v. *Overend, Gurney, & Co.*, L. R. 7 Ch. 142; 41 L. J. Ch. 332. See same case in H. L., *ante*, p. 662.

(d) *Pooley* v. *Harradine*, 7 El. & B. at p. 441; *Greenough* v. *M'Clelland*, *ante*, p. 650; *Bailey* v. *Edwards*, 4 B. & S. 761; 34 L. J. Q. B. 41; *Taylor* v. *Burgess*, 1 Law T. R. N. S. 12.

(e) *Hollier* v. *Eyre*, 9 Cl. & Fin. 45; *ante*, p. 650.

(f) Ld. Eldon, *Ex parte Glendinning*, Buck's B. C. 519.

(g) *Kearsley* v. *Cole*, 16 M. & W. 135; *Price* v. *Barker*, 4 Ell. & Bl. 779; 24 L. J. Q. B. 134.

(h) *Wyke* v. *Rogers*, 21 L. J. Ch. 613; *Boaler* v. *Mayor*, 19 C. B. N. S. 76; 34 L. J. C. P. 230.

of the time given to the principal creditor for payment does not discharge the surety. "When," observes Pothier, "the creditor, after the contract has been entered into, accords, through liberality, a certain term of payment to his debtor, he cannot lawfully exclude the sureties from a participation in the benefit of such term; for, as the agreement has the effect of qualifying the liability upon the principal obligation, and extending the term of payment, the obligation of the sureties necessarily receives the same modification, and they have the same term of payment as the principal debtor, it being the essence of the contract of suretyship that the surety should not be obliged to more than the principal" (*i*).

Release of the principal debt—Discharge of the surety.—If a debt secured by the collateral undertaking of a surety be unconditionally released or satisfied, the engagement of the surety is at an end, the extinguishment of the principal obligation necessarily involving in it the discharge of the surety. *Reo liberato liberantur fidejussores* (*k*). If, therefore, a creditor, by deed of composition, releases his debtor, and precludes himself from suing upon the original obligation for the original debt, the surety is discharged, unless the rights of the creditor against the surety have been expressly reserved on the face of the deed (*l*), or unless by the terms of the guarantee the surety is not discharged by the release of the principal debtor (*m*). "The surety," observes Pothier, "is discharged by novation of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt is not the debt for which he became bound" (*n*).

Release of the principal obligation, with reserve of remedies against the surety.—But, if the principal debtor has made default, so that the liability of the surety has accrued, and the creditor has an immediate right of action against him, the creditor may compound with the principal debtor, receiving a portion only of the debt, and may release him from the payment of the residue, and at the same time reserve all his rights and remedies against the surety. A deed of release of this sort, with reserve of remedies against the surety, is construed as a covenant not to sue, in order that effect may be given to the intention of the parties,

(*i*) Pothier (OBLIGATIONS), No. 381.

(*k*) *Webb* v. *Hewitt*, 3 Kay & J. 444; *Vorley* v. *Barrett*, 26 L. J. C. P. 1.

(*l*) *Lewis* v. *Jones*, 4 B. & C. 513, 515; *Green* v. *Wynn*, L. R. 4 Ch. 204; 38 L. J. Ch. 76 220; Dig. lib. 14, tit. 3.

(*m*) *Union Bank of Manchester* v. *Beech*, 3 H. & C. 672; 34 L. J. Ex. 133.

(*n*) Poth. (OBL.) No. 378; Cod. lib. 8, tit. 41, lex 4.

and the right of recourse against the surety be preserved (*o*). Where, therefore, upon the grant of an annuity, two co-sureties entered into a joint and several covenant for the payment by them of the annuity, in case of default made by the grantor, and default was made by him, and the co-sureties became liable upon their covenant, and a deed was then entered into between the grantor and grantee of the annuity and one of the co-sureties, whereby, in consideration of all arrears of the annuity being paid up by such co-surety, the latter was released from the future payment of the annuity, and from all further liability upon his covenant, but it was provided that nothing therein contained should prejudice the rights of the grantee of the annuity as against the grantor and the other co-surety, it was held that this proviso prevented the release from operating as a discharge of the co-surety, as it did not in anywise prejudice the latter or increase his liability (*p*). But a release of a debt "in like manner as if the debtor had obtained a discharge in bankruptcy" is an absolute release, and, if given without the surety's consent, discharges him (*q*). It seems to be the result of the authorities that a release qualified by a reserve of the remedies against sureties allows the surety to retain all his rights over against the principal debtor, and operates only so far as the rights of the surety may not be affected (*r*); but it remains to be considered in every case, whether the arrangement between the principal debtor and the creditor does prejudicially affect the rights or remedies of the surety (*s*); for, if it does, the surety is entitled to say that he is discharged (*t*).

Release of one of several co-sureties.—A release by the creditor of one of two or more co-sureties releases all (*u*). From some of the expressions of Lord Eldon (*x*), it would seem that a creditor might release one of his joint debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them; but Lord Eldon's authority upon this point has been expressly overruled (*y*).

Payment by the principal debtor operating as a discharge of the surety.—If a party becomes surety for the due payment of all money that comes to the hand of the principal, the surety is dis-

(*o*) *Nevill's case*, L. R. 6 Ch. 43; *Bateson* v. *Gosling*, L. R. 7 C. P. 9; 41 L. J. C. P. 53.

(*p*) *Thompson* v. *Lack*, 3 C. B. 552; *Kearsley* v. *Cole*, 16 M. & W. 135.

(*q*) *Cragoe* v. *Jones*, L. R. 8 Ex. 81; 42 L. J. Ex. 68.

(*r*) *Price* v. *Barker*, *ante*, p. 663.

(*s*) *Owen* v. *Homan*, 20 L. J. Ch. 323; 4 H. L. C. 1037.

(*t*) *Wright* v. *Sanders*, 3 Jur. N. S. 507.

(*u*) *Cheetham* v. *Ward*, 1 B. & P. 633.

(*x*) *Ex parte Gifford*, 6 Ves. 808.

(*y*) *Nicholson* v. *Revill*, 4 Ad. & E. 683; *Evans* v. *Bremridge*, 25 L. J. Ch. 104; as to release of one of several joint contractors, see *post*, p. 1222.

charged, if the principal pays in such currency as the parties to whom the payment is to be made are willing to accept. If, therefore, they have the option of receiving cash, and choose, nevertheless, to take bills or notes from the principal, which are ultimately dishonoured, the surety is nevertheless discharged. Thus, where a country banker was appointed treasurer of a poor law union, and the defendant became surety to the guardians for the due performance by him of the duties of his office, and the treasurer made a payment to the guardians, partly in cash and partly in the notes of his own bank, payable on demand, and the guardians kept the notes for a day or two, and the bank then stopped payment, it was held that the guardians, having elected to receive and keep the notes, could not, after the stoppage of the bank, repudiate the payment as against the surety (z). A payment accepted by the creditor in good faith and without notice, but which is afterwards avoided as a fraudulent preference, does not operate as a satisfaction of the debt or discharge the surety (a).

If the primary security proves worthless, whether it was so originally, or whether it becomes so afterwards, the surety is not discharged, unless the loss or deficiency of the original and primary security was occasioned by the act of the creditor (b). If the principal debtor has a set-off against the creditor arising out of the same transaction, the surety may take advantage of it in an action against him by the creditor for the amount guaranteed (c).

Fraud on sureties.—A creditor is not bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, unless the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence (d). If a person abstains from inquiry because he sees that the result of inquiry will be to disclose fraud, his want of knowledge of the fraud affords no excuse. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge (e). If, when a person agrees to become surety, any material part of the contract between the debtor and creditor is misrepresented or concealed from the surety with the knowledge of the creditor, the misrepresentation or concealment amounts to a fraud upon the surety, and discharges him from his engagement (f); but the principal is not bound to disclose to the surety every

(z) *Guard. Lich. Un.* v. *Greene*, 1 H. & N. 889.

(a) *Petty* v. *Cooke*, L. R. 6 Q. B. 790.

(b) *Hardwick* v. *Wright*, 35 Beav. 133.

(c) *Bechervaise* v. *Lewis*, L. R. 7 C. P. 372; 41 L. J. C. P. 161; the rule of the civil law was the same, Dig. lib. xvi., tit. 2, sect. 4.

(d) *Hamilton* v. *Watson*, 12 Cl. & Fin. 119; *Wythes* v. *Labouchere*, 5 Jur. N. S. 499.

(e) *Owen* v. *Homan*, 4 H. L. C. 1035.

(f) *Stone* v. *Compton*, 6 Sc. 846; 5 Bing. N. S. 142; *Railton* v. *Mathews*, 10 Cl. & Fin. 942; *Spaight* v. *Cowne*, 1 H. & M. 359; *Lee* v. *Jones*, 17 C. B. N. S. 482; 34 L. J. C. P. 131; *Blest* v. *Brown*, 3 Giff. 450.

material circumstance known to him that may be calculated to affect or increase the responsibility of the surety (g). Where a widow in straitened circumstances took a house upon the terms that she was to take the furniture of the preceding tenant at a valuation, provided she could raise the money, and a surety came forward upon the understanding that the price to be paid by her for the furniture had been settled at 70*l*., and became responsible for the payment of that amount, but it afterwards appeared that there had been a secret understanding between the widow and the parties, that the real price was to be 100*l*., and that the widow had given two promissory notes to secure the payment of the additional 30*l*., the existence of which, as well as of the underhand agreement, had been kept back from the surety, it was held that the transaction was a gross fraud upon the latter (*h*). So, where a surety had given a guarantee to the creditor to secure payment of iron of the value of 200*l*., to be supplied to the principal debtor, and it appeared that there had been a private agreement between the creditor and the principal debtor, that the latter should pay 10*s*. per ton beyond the market price, to be applied in liquidation of an old standing debt due to the former, it was held that the agreement was a fraud upon the surety, which discharged him from liability upon his contract (*i*). Where a surety was induced to execute a bond on a representation by the obligee that the principal was not indebted to him, which statement was untrue, it was held that he was entitled to have the bond cancelled (*k*).

If a man finds that his agent has betrayed his trust, that he owes him a sum of money, or that it is likely he is in his debt, and, under such circumstances, requires sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he is not so, he cannot afterwards avail himself of a guarantee obtained from a party who was ignorant of what was known to, and ought to have been disclosed by, the employer (*l*). So, if a person whose honesty is guaranteed makes defalcations, which the employer condones without notice to the guarantor, the latter is not liable for subsequent defalcations (*m*). But, if a person having doubts as to the circumstances of his agent, and therefore requiring fresh sureties, states his doubts at the time to these sureties, they have no right to complain when they are called upon to fulfil their engagement (*l*).

Discharge of the surety by the death of the principal.—Where

(*g*) *North Brit. Ass. Co.* v. *Lloyd*, 10 Exch. 523; 24 L. J. Ex. 14.

(*h*) *Jackson* v. *Duchaire*, 3 T. R. 552.

(*i*) *Pidcock* v. *Bishop*, 5 D. & R. 509, 511: 3 B. & C. 605.

(*k*) *Blest* v. *Brown*, 3 Giff. 450; *Cooper* v. *Joel*, 1 De G. F. & J. 240.

(*l*) *Smith* v. *Gov. & Co. Bank of Scot.*, 1 Dow, 292.

(*m*) *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

the liability of the surety does not arise until after default has been made by the principal, and the latter dies before making default, the surety is discharged. Thus, where A. becomes bound for the appearance or surrender of B. by a particular day, and B. dies before the day, A. is discharged from his obligation (*n*).

Death of surety.—A. having guaranteed thus: "To C. I request you will credit B.; and, in consideration thereof, I guarantee the running balance;" it was held that the promise was not revoked by A.'s death without notice to C. from the executor (*o*). It seems that after notice of the death the guarantee is revoked except where the consideration is given once for all, and is not for future advances (*p*).

Indemnification of sureties.—When the engagement of the surety is made with the knowledge and consent of the principal, there is in point of law an implied request from the latter to the surety to intervene on his, the principal's, behalf, if the latter makes default; and money paid by the surety for the purpose of discharging the claim against the principal is money paid for the use of the principal at his request, which may be recovered from the latter (*q*). The surety need not wait for the commencement of an action against the principal (*r*); but he cannot accelerate the liability of the latter; and, if he pays money voluntarily which he was not under any legal obligation to pay, he has no ground of action against the principal until the time of payment is past. A surety who has paid the debt of his principal is entitled to rank as a simple contract creditor for the amount, and, if made executor, to retain it out of the assets of the principal against all other creditors of equal degree (*s*). If A. has expressly agreed to indemnify B. against a particular claim or demand, and an action is brought on that demand against B., B. may then give notice to A. to come in and defend the action, and, if A. refuses to come in, B. may compromise at once on the best terms he can get, and then bring an action on the contract of indemnity. On the other hand, if B. does not choose to trust A. with the defence to the action, he may if he pleases go on and defend it, and if the verdict is obtained against him and judgment signed on it, that judgment is conclusive because that is the meaning of the contract between the parties (*t*).

(*n*) *Sparrow* v. *Sowgate*, W. Jones, 29.

(*o*) *Bradbury* v. *Morgan*, 1 H. & C. 249; 31 L. J. Ex. 462; and see *Harriss* v. *Fawcett*, L. R. 15 Eq. 311; *ib.* 8 Ch. 866, 869.

(*p*) *Coulthart* v. *Clementson*, 5 Q. B. D. 42; *Lloyds* v. *Harper*, 16 Ch. D. 290.

(*q*) *Kearsley* v. *Cole*, 16 M. & W. 128; *Boyd* v. *Brooks*, 34 L. J. Ch. 605; *Si quid autem fidejussor pro reo solverit, ejus recuperandi causâ habet cum eo mandati judicium.* Instit. lib. 3, tit. 21, § 6.

(*r*) *Small* v. *Currie*, 5 De G. M. & G. 159.

(*s*) *Boyd* v. *Brooks*, 34 L. J. Ch. 605.

(*t*) *Per* Mellish, L. J., *Parker* v. *Lewis*, L. R. 8 Ch. 1035, 1059.

By the French law, whether the surety has paid in consequence of a judgment of a court of law, or voluntarily and without legal process, is a matter of no moment; for, in either case, *utiliter debitoris negotium gerit.* He has procured his discharge from the debt, and ought, consequently, to be re-imbursed what it cost him to do so. But, if he has paid before the time of payment has elapsed, he cannot have recourse against the principal debtor until afterwards; for he ought not by his own act to deprive the latter of the term of indulgence which he has a right to enjoy (*u*). The surety may, however, by express contract, obtain a right to sue the latter before he has himself paid or satisfied the principal obligation. If the principal, for example, covenants with the surety that he will pay the creditor the debt by a day named, and makes default, the surety may sue him for the amount, although he has not himself, at the time he brings the action, paid any portion of the debt (*x*). By the law of France, and by the civil law, the surety is under no necessity for securing to himself this right by express contract; for, whenever the principal debtor falls into embarrassed circumstances, and is threatened with insolvency, that law accords to the surety a right to attach the goods and chattels of the principal debtor, and so provide himself with funds beforehand to answer the engagement he has entered into on his behalf (*y*).

If the surety has bound himself for the payment of a debt due from several joint debtors, and has been compelled to pay money on their joint account, they are jointly responsible to him for the re-payment of the amount (*z*).

Contribution between co-sureties.—It has previously been stated that, if several persons together become surety for one principal in respect of the same debt and transaction, either jointly or severally, or by the same or different contracts (*a*), and one of such co-sureties, after the liability of the principal has arisen, pays the debt, or satisfies the whole debt or claim, or more than his own proportion of it, he may have recourse to his co-sureties for contribution, and recover from them their several proportions of the common liability in an action for money paid by him for their use (*b*), unless the plaintiff seeking contribution has promised to save the defendant harmless (*c*), or the defendant has become surety at the request of the plaintiff and for his accommodation (*d*).

(*u*) Poth. (OBL.) No. 431, 439; Dig. lib. 17, tit. 1, lex 22.

(*x*) *Loosemore* v. *Radford*, 9 M. & W. 657.

(*y*) Poth. (OBL.) No. 442; Cod. lib. 4, tit. 35, lex 10.

(*z*) Poth. (OBL.) No. 440.

(*a*) And although they do not know of each other's liability; *Dering* v. *Earl of Winchelsea*, 1 Cox, 318; *Whiting* v. *Burke*, L. R. 10 Eq. 539; *ib.* 6 Ch. 342.

(*b*) *Kemp* v. *Finden*, 12 M. & W. 421.

(*c*) *Thomas* v. *Cooke*, 8 B. & C. 728.

(*d*) *Turner* v. *Davies*, 2 Esp. 478.

In equity, where one of three sureties had paid a sum of money, it was held that he was entitled to recover one moiety from another of the co-sureties, the third having become insolvent (*e*); but at law one of three co-sureties could only recover against any one of the others an aliquot proportion of the money paid, regard being had to the number of the sureties (*f*).

If one of two co-sureties pays part of the debt only, and less than his moiety, he is not entitled to resort to his co-surety for contribution; for the latter might subsequently have to pay an equal or greater portion of the debt; in the former of which cases such co-surety would have no contribution to pay, and in the latter he would have one to receive; and it would tend to multiplicity of suits and great inconvenience, if each co-surety might sue all the others for a rateable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the co-sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and that an action will lie for it (*g*). Where the plaintiff and defendant, together with the principal debtor, signed a joint and several promissory note, payable two months after date, as sureties for such principal debtor, and the latter paid only a portion of the amount of the note on its becoming due, and the plaintiff then paid the residue, although no demand had been made upon him by the creditor for payment, and subsequently brought his action against the defendant, his co-surety, for contribution, it was held that he was entitled to recover a moiety of the amount he had paid (*h*). All persons who by common consent put their names to an accommodation bill, whether as drawers, acceptors, or indorsers, in order that one of them may get the bill discounted for his own benefit, are co-sureties for the due payment of the bill; and, if the bill is dishonoured at maturity, and one of them is compelled to pay the amount of the bill, and thus releases all the other parties from their common liability upon the instrument, the one so paying is entitled to contribution from the others (*i*).

The principle of contribution amongst sureties has been established by the French jurists, observes Pothier, upon a principle of equity, which does not permit the co-sureties, who were all equally liable to the payment, and have all been equally benefited by the discharge of the principal obligation, to profit at the expense of

(*e*) *Peter* v. *Rich*, 1 Ch. C. 34; *Hitchman* v. *Stewart*, 3 Drew. 271.

(*f*) *Browne* v. *Lee*, 6 B. & C. 697; *Kemp* v. *Finden*, 12 M. & W. 421.

(*g*) Parke, B., *Davies* v. *Humphreys*, 6 M. & W. 169; *Ex parte Snowdon*, 17 Ch. D. 44.

(*h*) *Pitt* v. *Purssord*, 8 M. & W. 539.

(*i*) *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561; 30 L. J. C. P. 350.

him by whom the payment has been made, and who has acted for the benefit of his co-sureties at the same time that he was acting for himself (*k*). The civil law does not admit the principle of contribution between co-sureties, but enables each of them, before action brought, to protect himself from being sued for more than his own share (*l*). A surety is bound to bring into hotchpot for the benefit of his co-sureties a security given to him by the principal debtor, although he only consented to be surety upon having such security given him, and although the other sureties were not even aware of his having taken such security (*m*).

Assignments of judgments and securities to the surety to enable him to obtain indemnification.—Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, is entitled (19 & 20 Vict. c. 97, s. 5) to have assigned to him, or to a trustee for him, every judgment, specialty, or other security, held by the creditor in respect of the debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty; and such person is entitled to stand in the place of the creditor and use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, indemnification for the advances made, and loss sustained, by the person who has paid the debt or performed the duty; and the payment or performance by the surety is not pleadable in bar of any such action or other proceeding by him; but no co-surety, co-contractor, or co-debtor is entitled to recover from any other co-surety, co-contractor, or co-debtor more than the just proportion to which, as between these parties themselves, the latter is justly liable (*n*). This section applies to a contract entered into before the passing of the Act, provided a breach of it has taken place and payment has been made by the surety after the passing of the Act (*o*).

The creditor is bound to give to the surety the benefit of every security which he holds at the time of the contract, and is

(*k*) *Ayant quant à l'effet géré l'affaire de ses confidéjusseurs, en même temps qu'il faisait la sienne, les ayant par le paiement qu'il a fait libérés d'une dette qui leur était commune avec lui, l'équité exige qu'ils portent leur part de ce paiement, dont ils ont profité autant que lui.* Poth. (OBL.), No. 455; Argentré, 213, art. 194.

(*l*) Dig. lib. 46, tit. 1, lex 39; Instit. lib. 3, tit. 21, § 4.

(*m*) *Steel* v. *Dixon*, 17 Ch. D. 825, following two American cases; *Miller* v. *Sawyer*, 30 Vern. 412; *Hall* v. *Robinson*, 8 Iredell, 56.

(*n*) *Batchellor* v. *Lawrence*, 9 C. B. N. S. 543; 30 L. J. C. P. 42; *Drew* v. *Lockett*, 32 Beav. 499; *Strange* v. *Fooks*, 4 Giff. 408.

(*o*) *De Wolf* v. *Lindsell*, L. R. 5 Ex. 209; *Lockhart* v. *Reilly*, 1 De Gex & J. 464; 27 L. J. Ch. 54.

not in equity allowed in any way to vary the position of the surety with reference to those securities (*p*); and every security which the creditor has the benefit of at the time the contract of suretyship is entered into is supposed to be made known to the surety at the time he is entering into the obligation; and if, through any neglect on the part of the creditor, he is deprived of the benefit of them, or is put into a different position from that which he was in at the time the contract was entered into, he is discharged (*q*). But the surety is not entitled to have an assignment of the principal security, unless he pays the debt in full (*r*). The indorser of a bill is a surety to the holder for the payment, and having paid the bill, he is entitled to the benefit of any securities deposited with the holder by the acceptor, even although he was ignorant of such deposit (*s*).

Judgment against principal not binding sureties.—A judgment recovered against a principal does not bind a surety, who is entitled to have the case proved *de novo* (*t*).

Breach of contracts of indemnity—Bankruptcy of principal debtor.—If the principal debtor becomes bankrupt, or is discharged by a resolution under s. 125 of the Bankruptcy Act, 1869, the surety remains liable (*u*), but if he has paid the debt, he has a right to stand in the place of the original creditor against the estate of the principal debtor; and, if the creditor has received a dividend out of that estate, the surety has a right to be paid that dividend, or to have it deducted from the amount for which he is liable (*x*), and to have all future dividends secured to him (*y*), unless he has agreed to waive this right for the benefit of the creditor (*z*). Where a surety guaranteed the payment of any debt which the principal debtor might contract from time to time with the plaintiffs, as a running balance of account, to any amount not exceeding 400*l.*, and the plaintiffs, on the faith of this guarantee, allowed the principal to get into their debt to the extent of 825*l.*, and the principal then became insolvent, and assigned his effects to trustees for the benefit of his creditors, and the plaintiffs proved their debt of 825*l.* against his estate, and received from the trustees a dividend thereon of 8*s.* 9*d.* in the pound, and then brought an action against the surety on the guarantee, it was held that the

(*p*) *Pearl* v. *Deacon*, 24 Beav. 186; 26 L. J. Ch. 761.

(*q*) *Newton* v. *Chorlton*, 10 Hare, 650; *Strange* v. *Fooks*, 4 Giff. 412: *Forbes* v. *Jackson*, 19 Ch. D. 615: *Wulff* v. *Jay*, L. R. 7 Q. B. 756; 41 L. J. Q. B. 322. See also *Rainbow* v. *Juggins*, 5 Q. B. D. 138; C. A. 422.

(*r*) *Ewart* v. *Latta*, 4 Macq. H. L. C. 983.

(*s*) *Duncan & Co.* v. *N. & S. Wales Bank*, 6 Ap. Cas. 1.

(*t*) *Ex parte Young*, 17 Ch. D. 668.

(*u*) *Ellis* v. *Wilmot*, L. R. 10 Ex. 10.

(*x*) *Gee* v. *Pack*, 33 L. J. Q. B. 49; *Hobson* v. *Bass*, L. R. 6 Ch. 792.

(*y*) *Thornton* v. *M'Kewan*, 1 Hem. & M. 525; 32 L. J. Ch. 69.

(*z*) *The Midland Banking Co.* v. *Chambers*, L. R. 7 Eq. 179; *ib.* 4 Ch. 398.

dividend was to be deducted rateably from the whole debt, as well the part covered by the guarantee as the part which was left uncovered; and that the plaintiffs were trustees for the surety of the dividend of that portion of the debt which was covered by the guarantee, and could only recover from the surety the balance remaining of the 400*l.* after deducting the dividend (*a*). So, where two persons separately guaranteed the payment of all goods supplied to A. B., so that their liability should not exceed 250*l.* each, and goods were supplied to A. B. to the amount of 657*l.*, and he then became bankrupt, and the creditor proved for the whole amount, and, having obtained 250*l.* from each of the guarantors, afterwards received 2*s.* 1*d.* in the pound on the 657*l.*, it was held that each of the guarantors was entitled to a part of this dividend bearing to the whole the same proportion as 250*l.* to 657*l.* (*b*).

Recovery of interest on money paid by sureties—In cases of contracts of indemnity or suretyship, where a surety has been compelled to pay money which the principal debtor ought to have paid, and has, consequently, been damnified by the loss of the use of his money, he is entitled, in an action on the implied contract of indemnity against the principal, to recover interest on the money he has been compelled to pay (*c*), for in every contract of indemnity the party damnified is entitled to recover all such damages, costs, and charges as reasonably and naturally result from the fulfilment by him of the obligation he has contracted on behalf of the principal debtor (*d*)

Guarantees by one of several partners in the name of the co-partnership.—Where one of several partners gave a guarantee in the trading name of the firm to secure the payment of a debt of a third party, it was held by Lord Ellenborough that there was no implied authority resulting from the mere existence of the co-partnership to any one or more of the partners to pledge the partnership name for such a purpose (*e*). And, where one of two attorneys in partnership together, in order to obtain the discharge of a client from custody, signed the partnership name to an undertaking to pay the debt and costs, it was held that the other partner, who had given no express authority to his colleague to give such an undertaking, could not be sued thereon, as the giving of guarantees and undertakings of such a description was not within the usual course of business of attorneys, and the law, therefore, would raise no inference of any authority from the one

(*a*) *Bardwell* v. *Lydall*, 5 M. & P. 335; *Gee* v. *Pack*, 33 L J Q B 49

(*b*) *Hobson* v. *Bass*, L R 6 Ch 792, *Midland Bank. Co.* v *Chambers*, L R. 4 Ch. 398.

(*c*) *Petre* v *Duncombe*, 20 L J Q B. 242; *Ex parte Bishop*, 15 Ch D 400.

(*d*) *Smith* v *Howell*, 6 Exch 737

(*e*) *Duncan* v *Lowndes*, 3 Campb. 478.

partner to bind the other by such an undertaking (*f*). But, if the guarantee, when it has been given, is notified to the firm, and they do not dissent from it, or if it refers to a partnership transaction, and is given to secure the payment of goods supplied, or money advanced to the firm, and received by the co-partnership, and added to the joint stock, or if it has been given to secure the performance of something within the ordinary scope and business of the firm, and which one partner generally has power to undertake for on behalf of the firm, it binds all the partners, and all are liable to be sued thereon (*g*).

SECTION II.

OF MARINE INSURANCE.

Of contracts of insurance.—The contract of insurance is a contract whereby one of the contracting parties agrees to take upon himself, and protect the other from, the risks and accidents to which any particular property or any particular individual may be exposed, and covenants or promises, in consideration of a sum of money which the other contracting party pays or binds himself to pay to him as the price of the risk run, to indemnify the latter against these risks and accidents. The party who takes the risks upon himself, or undertakes to indemnify, is called the assurer or insurer, and commonly in our law the underwriter, from his subscribing his name at the bottom of the contract; the party protected by the contract, the assured or insured; and the money paid as the price of the indemnity, the premium for the risk; whilst the contract itself, or rather the written instrument evidencing or constituting it, is called a policy of insurance. Many discussions have taken place respecting the precise nature of this contract. Pothier calls it a species of contract of sale. The assured, he says, are the vendors, the assurer the purchaser, and the thing sold is a risk attached to the thing assured (*a*). Other writers make the contract a contract of letting and hiring; some declare it to be a contract of mandate; and others a contract of partnership. In our

(*f*) *Hasleham* v. *Young*, 5 Q. B. 833; 13 L. J. Q. B. 205; *Brettel* v. *Williams*, 4 Exch 629.

(*g*) *Ex parte Notte*, 2 Gl. & Jas. 306; *Sandiland* v. *Marsh*, 2 B. & Ald. 679; *Ex parte Gardom*, 15 Ves. 286; *In re West of England Bank*, 14 Ch. D. 317.

(*a*) Pothier, Contrat d'Assurance, No. 4.

own law it is considered, so far as it relates to sea risks and risks of fire, to be a guarantee or contract of indemnity.

Mutual insurance consists in the association of different proprietors of property exposed to the same risk, with a view of indemnifying at the common expense those members who suffer loss. The members of such an association are at the same time insurers and insured; and the engagement which each of them contracts with the association at large as an insurer is the consideration or price of the insurance or indemnity which the society promises or guarantees to him in return (*b*).

Policies of insurance.—The owner of the property or interest insured generally pays to the insurer or underwriter a premium at a certain rate per cent.; and the latter then subscribes the ordinary written or printed instrument, called a policy of insurance, whereby he expresses that he "doth make assurance" and cause the party "to be insured" in a certain sum, on certain specified property, for a certain voyage or for a certain time, against certain risks and perils which are enumerated and set forth in the policy. The policy is frequently preceded by a "SLIP," which is a short memorandum of the terms of the insurance, to which the underwriters subscribe their initials, with the sums for which they are willing to engage. But the slip is often nothing more than an offer or proposal of terms preliminary to the contract (*c*).

Voyage and time policies—Valued and open policies.—When the insurance is on a voyage from one port to another, without reference to time, the policy is called a voyage policy; but, when it is from one fixed period to another, such as "from the 1st of March, 1875, to the 1st of January, 1876," or for three, six, or twelve months, &c., the policy is a time policy. Sometimes a policy is so made as to be partly a voyage policy and partly a time policy (*d*). When the value of the property insured, as between the assured and the underwriter, is expressed on the face of the policy, the policy is called a valued policy (*e*). When it is not so expressed, but is left to be estimated in case of loss, the policy is called an open policy. In the one case the declared value establishes the pecuniary interest and loss of the assured as between himself and the underwriter; and in the other the value has to be proved. "The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial;" and this must be fairly done, with a view of obtaining a fair indemnity;

(*b*) Encyc. du Droit, ASSURANCE.

(*c*) *Rogers* v. *Macarthey*, Park. Ins. 39; *Parry* v. *The Great Ship Co.*, 4 B. & S. 556; 33 L. J. Q. B. 41; *post*, p. 679; *Maspous-y-Hermanos* v. *Mildred*, 9 Q. B. D. 531.

(*d*) *Gambles* v. *Ocean Marine Ins. Co.*, 1 Ex. D. 141, C. A.

(*e*) *Wilson* v. *Nelson*, 5 B. & S. 354; 33 L. J. Q. B. 220.

for, if the policy be enormously overvalued, that will be evidence of fraud (*f*). In the absence, however, of fraud or wagering, the value stated in the policy is conclusive, however largely in excess of the true value (*g*), unless it appears that there is some mistake as to the thing insured (*h*), or some question outside of the contract has arisen (*hh*). If the value declared is the value of a full cargo, and, at the time of the loss, there was not a full cargo on board, the insurers are not liable for the full amount of the declared value, but only for the real loss, and the policy in such case must be treated as an open policy (*i*); for, as the contract is strictly a contract of indemnity for a real loss, the law will not permit it to be made a means of profit and gain to one of the parties at the expense of the other (*post*, p. 725).

When the insurance is on goods, to be thereafter declared and valued, the assured has the power, by duly declaring and valuing before knowledge of the loss, to make the policy a valued policy; but if the assured do not so declare and value, it is then an open policy, and the interest is matter of evidence at the trial. The declaration, when made, does not require the assent of the underwriters. It is generally put upon the policy for convenience; but this is not necessary, nor is there any necessity for its being in writing. The making of the declaration is not a condition precedent which must be fulfilled by the assured before the liability of the underwriters attaches; yet, in order to be available, it must be made and communicated to the underwriters, or some one on their behalf, before intelligence has been received of the loss of the subject-matter of insurance. If it is not so made and communicated, the policy becomes, as we have already seen, an open policy (*k*). Where goods are insured at a value very greatly in excess of their real value, the non-disclosure of this circumstance to the underwriter may avoid the policy (*l*). The rule is, that all facts should be disclosed which are material to enable an underwriter to judge whether he shall accept the risk and at what rate, not that merely facts should be disclosed which are material to the risk (*m*). Where the loss of the ship is not the risk insured against, but the risk depends upon some other contingency not known to have happened, the fact of the loss of the ship being known to both parties at the time the insurance is effected will not

(*f*) *Lewis* v. *Rucker*, 2 Burr. 1171.

(*g*) *Irving* v. *Manning*, 1 H. L. Cas. 287; *Barker* v. *Janson*, L. R. 3 C. P. 307.

(*h*) *Williams* v. *North China Ins. Co.*, 1 C. P. D. 757, C. A.; see *post*, p. 725.

(*hh*) *Burnand* v. *Rhodocanachi*, 7 Ap. Cas. 333.

(*i*) *Tobin* v. *Harford*, 13 C. B. N. S. 791; 17 C. B. N. S. 528; 34 L. J. C. P. 37; the same rule prevails in the case of a valued policy on freight; *Denoon* v. *Home & Colonial Ass. Co.*, L. R. 7 C. P. 341; 41 L. J. C. P. 162.

(*k*) *Harman* v. *Kingston*, 3 Campb. 151; *Robinson* v. *Touray*, *ib.* 159.

(*l*) *Ionides* v. *Pender*, L. R. 9 Q. B. 531.

(*m*) *Rivaz* v. *Gerussi*, 6 Q. B. D. 222.

invalidate the policy; for the knowledge that will vitiate a policy must be a knowledge of the loss of the subject-matter of the contract (*n*). When the premium is paid down and received at the time of the making of the contract, the policy is not usually signed by both parties, but only by the insurer; and in these cases, therefore, it partakes of the nature of a guarantee, the insurer warranting the safe arrival of the ship, cargo, or merchandise, at the place of destination.

Insurable interests—Wagering and gaming policies of insurance.—By the 19 Geo. 2, c. 37, s. 1, it is enacted, that no assurance shall be made by any person on any ship, or on any goods or merchandise laden on board thereof, interest or no interest, or without further proof of interest than the policy, by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such insurance shall be void (*o*). The fact of a person being named both shipper and consignee in a bill of lading is *primâ facie*, but not conclusive, evidence of an insurable interest in him. If he is a mere agent without lien on the goods, or possession of them as a bailee, or liability to account for their loss by the perils insured against, he has no insurable interest (*p*). An insurance on profits of goods laden on board a vessel is an assurance on goods within the meaning of this statute (*q*), and so it seems is an insurance upon commission (*r*). Freight, or the profit derivable from the carriage of goods or the hire of a vessel, constitutes a good insurable interest; and so does the profit which the shipowner ordinarily makes from carrying his own goods in his own vessel to a distant market, or any profits fairly expected to be made in the due course of trade (*s*); also the special property which a carrier has in the goods entrusted to him to carry (*t*), or the interest which an executor has in the property of his testator before probate of the will has been granted, or the interest which captors have in time of war in the prizes taken by them (*u*), or which the crown has in prizes before condemnation, or the freight which the freighter of a vessel has paid in advance, or the legal and equitable interest which mortgagors and mortgagees have in the mortgaged property, or the interest which a party has in the security of property the safety of which he has guaranteed for some determinable period (*x*),

(*n*) *Gledstanes* v. *R. Ex. Ass. Co.*, 5 B. & S. 797; 34 L. J. Q. B. 30; *Mead* v. *Davison*, 3 Ad. & E. 307.

(*o*) *Lowry* v. *Bourdieu*, 2 Doug. 468; *Kent* v. *Bird*, 2 Cowp. 583.

(*p*) *Seagrave* v. *Union Marine Insurance Co.*, L. R. 1 C. P. 305; 35 L. J. C. P. 172.

(*q*) *Smith* v. *Reynolds*, 1 H. & N. 223; 25 L. J. Ex. 337; *De Mattos* v. *North*, L. R. 3 Ex. 185; *Allkins* v. *Jupe*, 2 C. P. D. 357.

(*r*) *Allkins* v. *Jupe*, *supra*.

(*s*) *M'Swiney* v. *R. Ex. Ass. Co.*, 14 Q. B. 634; 18 L. J. Q. B. 193; *Chope* v. *Reynolds*, 5 C. B. N. S. 642; 28 L. J. C. P. 194.

(*t*) *Crowley* v. *Cohen*, 3 B. & Ad. 478.

(*u*) *Le Cras* v. *Hughes*, Park. Ins. 568; *Boehm* v. *Bell*, 8 T. R. 154; *Irving* v. *Richardson*, 2 B. & Ad. 193.

(*x*) *Waters* v. *Monarch Life Ass. Co* 5 E. & B. 870; 25 L. J. Q. B. 102.

or the interest which a purchaser has in specific, ascertained chattels bought by him, but which remain in the hands of the vendor, covered by the lien of the latter for the unpaid purchase-money (y), or which the charterer of a vessel, or the hirer or lessee of personalty or realty, has in the property entrusted to him to be used for hire. It has been decided, but after the greatest possible difference of opinion, that the purchaser of a "cargo" at so much per cwt. cost and freight, which is to be loaded when a ship which is expected arrives, has no insurable interest (z). A defeasible or inchoate interest may be insured as well as an absolute and perfect interest, but not a mere expectancy (a). The wages of labour cannot be assured; for it would take away the stimulus to exertion to secure to the workman the payment of his wages at all events, and would be contrary to public policy. Where the insurance does not exclude British ships they must be taken to be included (b). Formerly the interest which the underwriter himself acquires in the safety of the property he has insured could not have been re-insured (c); but by the 27 & 28 Vict. c. 56, s. 1, re-insurance may now be effected upon any ship or vessel, or upon any goods.

Whenever the policy is effected on property valued at a certain sum, and it is expressly provided that the policy shall be deemed sufficient proof of interest, the insurance is in principle an insurance, "interest or no interest," and void within the statute (d). As no person can sue upon a policy who is not really interested therein, it follows that, if the assured assigns away his interest after the making of the policy, he cannot maintain an action upon it for his own benefit. He can sue upon it only in one way, *i.e.*, as a trustee for the assignee in a case where the policy is handed over to him upon the assignment (e). But, wherever he sustains a *bonâ fide* loss by the destruction of the subject-matter of the insurance, he is entitled to be indemnified, and may sue upon the contract; and the court will not allow underwriters to get rid of their liability merely because the name of the party they have agreed to indemnify is not on the register (f). If the policy is on goods lost or not lost, the indemnity extends to past as well as future losses; and it is no answer, therefore, to an action on such a policy to say that the interest was not acquired until after the loss (g). As the fact of the ship being lost at the time the policy is effected does not prevent such policy from attaching, so also the

(y) *Sparkes* v. *Marshall*, 3 Sc. 172.
(z) *Anderson* v. *Morice*, 1 Ap. Cas. 713.
(a) *Devaux* v. *Steele*, 6 Bing. N. C. 371; *Stockdale* v. *Dunlop*, 6 M. & W. 233.
(b) *Allkins* v. *Jupe*, *supra*.
(c) 19 Geo. 2, c. 37.
(d) *Murphy* v. *Bell*, 4 Bing. 567; 1 M. & P. 493.
(e) *Powles* v. *Innes*, 11 M. & W. 10.
(f) *Hutchinson* v. *Wright*, 27 L. J. Ch. 835.
(g) *Sutherland* v. *Pratt*, 11 M. & W. 312.

fact, unknown to the parties, that the ship has arrived safely does not prevent a policy from attaching, and the premium is payable thereon (*h*).

Requisites of the contract.—Contracts of insurance must be expressed in a policy which must specify the particular risk or adventure, the names of the subscribers, and the sums insured (*i*). If any of these particulars are omitted, or if the policy is for any time exceeding twelve months, it is void (*k*). And no policy can be pleaded or given in evidence unless it is duly stamped, except in the case of mutual insurances or formerly of policies made abroad (*l*). But the slip, although not valid as a contract, may be given in evidence to show the intention of the parties (*m*). By the 28 Geo. 3, c. 56, it is enacted that it shall not be lawful for any person to effect a policy of insurance upon any ship, or upon any goods, merchandise, or property whatever, without first inserting in such policy the name or the usual style and firm of one or more of the persons interested in such insurance, or of the consignor or consignee, or of the person in Great Britain receiving the order to insure and effecting the insurance, or of the person who shall give the order to the agent immediately employed to negotiate the policy (*n*). If the policy is effected by the policy broker or agent "for the benefit of all parties interested," these last may become privy to the contract by adopting it (*o*); and any person who acquires an interest in the subject-matter of the insurance, whilst it is covered and protected by such a policy, may sue thereon for an indemnity against loss (*p*). The subject-matter of the insurance must be correctly and clearly described, so that the things insured may be ascertained and identified, and so that it may be known to what articles the risk attaches, whether it be to the ship, the freight, or the whole or part of the cargo (*q*). The policy need not be expressed to be a re-insurance where such is the fact, though it would seem that if such a fact were intentionally concealed and were material, the policy might be rendered void by the fraud (*r*). But wherever the peculiar nature of the interest alters the risk such

(*h*) *Bradford* v. *Symondson*, 7 Q. B. D. 456.

(*i*) 30 Vict. c. 23, s. 7; *Reid* v. *Allan*, 4 Exch. 326; *Fisher* v. *The Liverpool Marine Insurance Co.*, L. R. 8 Q. B. 469; 42 L. J. Q. B. 224; *Ex parte Hargrove*, L. R. 10 Ch. 542; *Edwards* v. *Aberayron Ship Ins. Soc.*, 1 Q. B. D. 563.

(*k*) 30 Vict. c. 23, ss. 7, 8.

(*l*) 30 Vict. c. 23, s. 9. The exception as to policies made abroad is repealed, see St. L. R. Act, 1875. As to the making of alterations in the policy, see 30 Vict. c. 23, s. 10. By sect. 12, insurances by carriers by sea are to be deemed to be contracts for sea insurance.

(*m*) *Ionides* v. *Pacific Insurance Co.*, L. R. 7 Q. B. 517; 41 L. J. Q. B. 190.

(*n*) *Wolff* v. *Horncastle*, 1 B. & P. 316; *Mellish* v. *Bell*, 15 East, 6; *Hibbert* v. *Martin*, 1 Campb. 538.

(*o*) *Hagedorn* v. *Oliverson*, 2 M. & S. 490; *Barlow* v. *Leckie*, 4 Moore, 8; *Stirling* v. *Vaughan*, 11 East, 619.

(*p*) *Sutherland* v. *Pratt*, 11 M. & W. 296.

(*q*) *Crowley* v. *Cohen*, 3 B. & Ad. 485.

(*r*) *Mackenzie* v. *Whitworth*, L. R. 10 Ex. 142; 1 Ex. D. 36, C. A.

interest is the subject-matter of the insurance, and must be stated in the policy (s).

Matters and things covered by the policy.—If a person insures a cargo to be laden on board on the Brazilian coast, the policy will not cover and protect a cargo taken on board on the coast of Africa (t). If the ship only is ensured, the policy will not, of course, cover and protect the merchandise laden on board (u); and, if the insurance is merely on "the ship's tackle and furniture," it will not cover stores, harpoons, lines, and fishing-tackle, put on board to be used in the whale fishery (x), unless the vessel is described in the policy as a whaling vessel, and the insurance is declared to be made on a whaling adventure. The provisions of the crew are covered by a policy on "the furniture of the ship" (y). But, if a ship is disabled and puts into port to re-fit, or is detained by an embargo, the extraordinary wages and provisions for the crew during the detention cannot be charged against the underwriter of a policy on the ship, cargo, and furniture (z). A mere mistake in the name of the ship will not avoid the policy and discharge the underwriters, if the identity of the vessel with the vessel named in the policy is clearly established, and the underwriters have in nowise been prejudiced by the mistake (a). Whatever is considered, by the custom and usage of trade to be comprehended under the term "goods, specie, and effects," will be covered by a policy upon such property. Money expended by the captain in the course of the voyage for the use of the ship, and for which *respondentia* interest was charged, is in some trades included by custom under these words (b). A general policy of insurance on goods laden on board a particular vessel extends to all goods which form part of the cargo, and will cover and protect goods laden on deck, provided it is customary for goods to be so laden, and the risk of the insurer is not thereby increased beyond what must be presumed to have been contemplated at the time the insurance was effected (c). If the insurance is upon all goods that may be laden on board a particular vessel on an outward and homeward voyage, the policy will attach on any goods that may be carried out or brought back on board such vessel (d). If the insurance is on goods from "any port or ports in the East Indies"

(s) *Mackensie* v. *Whitworth*, *supra*; 1 Ex. D. p. 42.

(t) *Robertson* v. *French*, 4 East, 130.

(u) Molloy, b. 2, c. 7, s. 8.

(x) *Hoskins* v. *Pickersgill*, Park. Ins. 126.

(y) *Brough* v. *Whitmore*, 4 T. R. 206.

(z) *Robertson* v. *Ewer*, 1 T. R. 132; *De Vaux* v. *Salvador*, 4 Ad. & E. 420.

(a) *Le Mesurier* v. *Vaughan*, 6 East, 385; *Ionides* v. *Pacific Ins. Co.*, L. R. 6 Q. B. 674; 7 Q. B. 517; 41 L. J. Q. B. 190.

(b) *Glover* v. *Black*, 1 Park, Ins. 10; see *Mackensie* v. *Whitworth*, L. R. 10 Ex. 142; 1 Ex. D. 36, C. A.

(c) *Da Costa* v. *Edmunds*, 4 Campb. 142.

(d) *Grant* v. *Paxton*, 1 Taunt. 463.

to "any port or ports" in this country, the insurance will cover any goods that may be shipped from the East Indies for England, whatever vessel may be selected for their conveyance (e). And, if an insurance is effected on goods on board "any ship or ships" that may sail during a particular period from one port to another, or from one part of the world to another, and goods of the assured are laden on board different vessels, some of which arrive safe and others are lost, the assured will have a right to apply the policy to the ships that are lost, and the underwriters cannot discharge themselves from liability by showing that ships answering the description in the policy have arrived safe (f).

Oral evidence is admissible to explain the customary meaning of terms used in a particular trade, but not to add a new term to the contract, or to show that more things were intended to be insured than are ordinarily or customarily included under the express terms of the contract.

Implied warranties—Seaworthiness of the vessel—Time policies and voyage policies.—There is an implied warranty in voyage policies on the part of the insurer that the ship insured is seaworthy, "tight, staunch, and strong," at the time of the commencement of the voyage (g); but in the case of time policies there is no such warranty, although the time policy be effected upon an outward bound ship, lying in a British port, where the insuring owner resides, or on a new vessel about to undertake her first voyage (h). Before the assured, however, can recover against the underwriter upon a voyage policy, "he is bound to prove, not only that the ship was tight, staunch, and strong, but that she was properly equipped with sails and stores, and that she was manned with a sufficient crew to navigate her on the voyage insured. These are conditions precedent to the policy attaching; and, if they are not complied with, so that the perils are enhanced, from whatever cause this may arise, and though no fraud was intended by the assured, the underwriters have a right to say they are not liable" (i); but the assured is not obliged to keep the ship seaworthy throughout the voyage, or during the period of the risk (k). The insured warrants that the ship is seaworthy for the purposes of the particular subject-matter of the insurance. Therefore in the case of a policy of insurance on deck cargo, it is not a

(e) *Hunter* v. *Leathley*, 10 B. & C. 858.

(f) *Kewley* v. *Ryan*, 2 H. Bl. 343.

(g) *Cohn* v. *Davidson*, 2 Q. B. D. 455.

(h) *Fawcus* v. *Sarsfield*, 6 Ell. & Bl. 200; 25 L. J. Q. B. 249; *Thompson* v. *Hopper*, 6 Ell. & Bl. 172; 25 L. J. Q. B. 240; *Gibson* v. *Small*, 4 H. L. C. 353; *Small* v. *Gibson*, 16 Q. B. 158; *Michael* v. *Tredwin*, 17 C. B. 551; see also *Dudgeon* v. *Pembroke*, 2 Ap. Cas. 284.

(i) Ld. Ellenborough, *Wedderburn* v. *Bell*, 1 Campb. 1; *Douglas* v. *Scougall*, 4 Dow, 269.

(k) *Jenkins* v. *Heycock*, 8 Moo. P. C.

compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself because the deck cargo is such as may be readily jettisoned in such weather (*l*). The insurer is entitled to expect that the shipowner will do all that can reasonably be expected to be done, to limit the risk covered by the insurance to those perils incidental to navigation which the care and skill of man cannot provide against. But, where the nature of the adventure and the size and class of vessel to be employed, are known to both parties, the implied warranty of the shipowner cannot be carried further than that he shall do his utmost to make the particular vessel as fit for the voyage as she can possibly be made. Therefore, in sending a river steamer across the ocean, the warranty of seaworthiness is complied with, if the nature of the adventure is disclosed to the underwriter, and the owner does as much as can reasonably be done to make her fit for the voyage, though she may not be considered seaworthy in the ordinary sense of the term as applied to ordinary sea-going vessels (*m*).

Non-compliance with the requirements of the statutes respecting the engagement of the crew does not render a vessel unseaworthy; it must be shown that the crew was actually insufficient in number, or that there was a want of capacity in the master or other officers (*n*). If a ship becomes leaky or founders without any adequate cause as soon as she leaves the port, the presumption is that the vessel was unseaworthy at the time she put to sea (*o*). If the vessel is not properly found with cables, anchors, and ground tackling, she is unseaworthy (*p*); and so she is, if she has an insufficient crew, or an incompetent captain, or has no pilot on board at those parts of the voyage where a pilot is required (*q*); but, if a competent master, and crew and pilot have been provided in the first instance, the insurer is not discharged by their negligence or want of skill; "for there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew or pilot during the whole course of the voyage" (*r*). If the master is unable, from stress of weather or other causes, to procure a pilot, this is a risk covered by the

361; *Biccard* v. *Shepherd*, 14 Moo. P. C. 471.

(*l*) *Daniells* v. *Harris*, L. R. 10 C. P. 1.

(*m*) *Burges* v. *Wickham*, 3 B. & S. 669; 33 L. J. Q. B. 17; *Clapham* v. *Langton*, 34 L. J. Q. B. 46.

(*n*) *Redmond* v. *Smith*, 8 Sc. N. R. 270.

(*o*) *Davidson* v. *Burnand*, L. R. 4 C. P. 117.

(*p*) *Watson* v. *Clark*, 1 Dow, 336; *Parker* v. *Potts*, 3 *ib.* 23; *Wilkie* v. *Geddes*, *ib.* 57.

(*q*) *Tait* v. *Levi*, 14 East, 481.

(*r*) *Sadler* v. *Dixon*, 8 M. & W. 895; 5 M. & W. 415.

policy, and the insurer remains liable (*s*). And, if by accident or mistake a vessel sails out of port in an unseaworthy state, and the defect is remedied before any loss occurs, and she then sails again in a seaworthy state, the insurer will be liable on the policy for a subsequent loss (*t*). The parties may make any stipulations they think fit in the policy respecting the seaworthiness of the vessel; and the insurer may consent to take her as seaworthy, or insure conditionally, on certain repairs being done. The assured also impliedly warrants that a loss shall not happen through his own personal default, and that he will himself do nothing to enhance the risk. If he neglects to have the ship properly documented according to her national character, or if he furnishes her with simulated papers without the knowledge of the underwriters, these last will be released from all liability upon the policy in respect of losses occasioned by the neglect, as such increased risk is not the risk they intended to take upon themselves (*u*).

If the insurance attaches before the voyage commences, it is enough if the state of the ship is commensurate with the then risk; and, if the voyage is such as to require a different complement of men or state of equipment in different parts of it, as if it be a voyage down a canal or river, and thence to and on the open sea, it is enough if the vessel be at the time when she enters upon each stage of the navigation properly manned and equipped for it (*x*). In the case of an insurance on goods there is no implied warranty that the goods are fit to encounter the ordinary risks or vicissitudes of the voyage; and it is no answer to the claim of the insurer to say that the goods were in an unfit condition to be shipped, unless it can be shown that the loss arose from that unfitness (*y*). In the case of an insurance on goods on board an English ship there is no implied warranty that the ship shall continue English (*z*).

In a voyage policy of insurance "at and from a port," there is an implied warranty that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there

(*s*) *Phillips* v. *Headlam*, 2 B. & Ad. 383.

(*t*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320; but see *The Quebec Marine Insurance Co.* v. *The Commercial Bank of Canada*, L. R. 3 P. C. 234.

(*u*) *Oswell* v. *Vigne*, 15 East, 70; *Pipon* v. *Cope*, 1 Campb. 434; but if the master violates the 16 & 17 Vict. c. 107, *post*, p. 690, by stowing a portion of the cargo on deck, and sails without a certificate of clearance, the absence of that document does not create a statutory unseaworthiness so as to discharge the underwriter, *Wilson* v. *Rankin*, L. R. 1 Q. B. 162; 35 L. J. Q. B. 87.

(*x*) *Dixon* v. *Sadler*, 5 M. & W. 414; 8 M. & W. 899; *Bouillon* v. *Lupton*, 15 C. B. N. S. 138; 33 L. J. C. P. 37; *The Quebec Marine Insurance Co.* v. *The Commercial Bank of Canada*, *supra*.

(*y*) *Koebel* v. *Saunders*, 17 C. B. N. S. 78; 33 L. J. C. P. 310; *Boyd* v. *Dubois*, 3 Campb. 132.

(*z*) *Dent* v. *Smith*, L. R. 4 Q. B. 414; 38 L. J. Q. B. 144.

is delay beyond such time, the policy does not attach (*a*). It is a question for the jury whether the fact of the ship proving unseaworthy shortly after starting shows that it was so before starting. The burden of proof is upon the underwriters to show that the ship was unseaworthy at starting (*b*).

Express warranties.—Every positive averment or allegation on the face of a policy of insurance of facts material to the risk, forming the basis of the contract, "amounts to a warranty; and, if such allegation be not strictly true, the assured cannot recover on the policy, to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty or wholly independent of it; for it is a condition on which the contract is to take effect, which failing, the contract fails" (*c*). But every representation inserted in a contract does not, as we shall see (*post*, pp. 981, 982), amount to a warranty. A written memorandum, statement, or representation does not become part of the policy from being folded up in it, or pinned on thereto (*d*); but, if the policy refers to it or to any separate writing or memorandum, the two documents may then be placed in juxtaposition and read together (*e*). When there is a warranty that the vessel "is well" on the day the insurance is effected, the warranty is complied with if the vessel was safe at any time on the day named, so that, if the vessel should have been lost in the morning of that day, and the insurance be effected in the afternoon, the underwriters will be liable (*f*). The warranties most frequently met with in maritime policies are warranties of the time of sailing, of departure with convoy, and warranties of neutrality.

Time of sailing.—When the vessel is warranted to sail by a particular day, the underwriter will be discharged if she does not sail at the time appointed; and the circumstance of her being prevented by inevitable accident, or restraint, or detention of princes, does in nowise exonerate the assured from the consequences of his breach of contract (*g*). When the vessel has left her loading port with all her cargo and clearances on board, with no other object in view than to get in the safest way she can to the port of delivery, this is a sailing within the meaning of the warranty, although she does not proceed straight to sea, but sails to some general place of rendezvous to wait for convoy (*h*). But

(*a*) *De Wolf* v. *Archangel Insurance Co.*, L. R. 9 Q. B. 451.

(*b*) *Pickup* v. *Thames Ins. Co.*, 3 Q. B. D. 594.

(*c*) Le Blanc, J., *De Lothian* v. *Henderson*, 3 B. & P. 515; *De Hahn* v. *Hartley*, 1 T. R. 343; *Ollive* v. *Booker*, 1 Exch. 423.

(*d*) *Pawson* v. *Ewer*, 1 Doug. 11 n.

(*e*) *Routledge* v. *Burrell*, 1 H. Bl. 254; *Worsley* v. *Wood*, 6 T. R. 710.

(*f*) *Blackhurst* v. *Cockell*, 3 T. R. 360.

(*g*) *Hore* v. *Whitmore*, 2 Cowp. 784.

(*h*) *Bond* v. *Nutt*, 2 Cowp. 601; *Wright* v. *Shiffner*, 11 East, 515; *Thel-*

she must be actually out of port or be sailing down a river towards the sea, and have made a *bonâ fide* commencement of the voyage, in order to satisfy a warranty to sail (*i*). If the warranty be to sail after a specific day, and the ship sails before, or if it be not to sail during a particular period of the year, and the ship sails during the prohibited period, the liability on the policy does not attach, as the risk is a different risk from the one agreed to be run by the underwriter (*k*).

Warranties—Sailing with convoy.—If a vessel warranted "to depart with convoy" is proceeding from her loading port to the nearest place of rendezvous for convoy and is captured, the underwriters are nevertheless responsible, as the vessel was fulfilling the warranty at the time of the capture in the only mode in which it could be fulfilled, and was proceeding to secure convoy and departing with convoy, in the mercantile sense of the term, and according to the usage of trade (*l*). A warranty that the vessel shall "depart with convoy" does not mean merely that she is to sail out of port or from the place of general rendezvous with convoy, but that she is to have convoy for the whole voyage insured, unless prevented by stress of weather (*m*), or unless it is the usage for ships to be convoyed only part of the distance, and convoy beyond a certain point is not deemed necessary and is not provided by the government (*n*). The mode and nature of the convoy are regulated by mercantile usage; and it is never considered necessary for the ship to be convoyed throughout by the same vessels, there being in general relays of convoy from stage to stage (*o*).

Neutrality.—Whenever property is insured as neutral property which is not neutral property, there is no contract, and no action can be maintained on the policy. But, if the property is neutral at the time the insurance is effected and the risk attaches on the policy, the circumstance of its ceasing to be so at a subsequent period does not affect the underwriter's liability (*p*). "If a war break out the next day, the underwriter is liable" (*q*). It is no answer to an action on a policy of insurance that the goods were contraband of war, and were shipped for the purpose of being sent to a belligerent port, unless facts establishing a fraudulent con-

lusson v. *Fergusson*, 1 Doug. 361; *Cockrane* v. *Fisher*, 1 C. M. & R. 809; *Lang* v. *Anderdon*, 3 B. & C. 495.

(*i*) *Moir* v. *R. Exch. Ass. Co.*, 4 Campb. 84; *Ridsdale* v. *Newnham*, 3 M. & S. 456; *Graham* v. *Barras*, 5 B. & Ad. 1011.

(*k*) *Vezian* v. *Grant*, 2 Park. Ins. 670; *Colledge* v. *Harty*, 6 Exch. 205.

(*l*) *Anderson* v. *Pitcher*, 2 B. & P. 164.

(*m*) *Jefferyes* v. *Legendra*, 1 Show. 297; *Lilly* v. *Ewer*, 1 Doug. 72.

(*n*) *D'Eguino* v. *Bewicke*, 2 H. Bl. 551.

(*o*) *De Garey* v. *Clagget*, 2 Park, Ins. 708.

(*p*) *Eden* v. *Parkinson*, 2 Doug. 732; and see *Dent* v. *Smith*, L. R. 4 Q. B. 414; 38 L. J. Q. B. 144.

(*q*) *Saloucci* v. *Johnson*, 2 Park, Ins. 716.

cealment (*infra*) are set forth (*r*). The sentence of a foreign court of admiralty, or prize court, falsifying the warranty of neutrality, will be conclusive evidence of the breach thereof (*s*), unless it appears on the face of such sentence that the grounds of the adjudication are erroneous, or the adjudication itself is involved in doubt and ambiguity (*t*). It has been held that an American by birth, who has resided for some years with his family in England, going occasionally to America, is so far to be considered a British subject that, if a ship of his be warranted American property, it is not to be deemed so, though the vessel was built in America and registered there (*u*).

Fraudulent misrepresentation.—Oral evidence of representations and statements made at the time the policy was effected are inadmissible in evidence to control, alter, or affect the liability upon the policy, unless they are fraudulent representations (*x*). All material statements and representations which are false to the knowledge of the party making them are fraudulent, and may be proved by oral testimony in order to deprive the plaintiff of his right of action upon the contract (*y*). The misrepresentation will be of a material fact, and will avoid the policy, if it be an assertion in time of war that the ship will sail with convoy or in company with other vessels, and carry a certain force (*z*). If the representation is true in substance, the policy will not be avoided, although it may be incorrect in minor details; nor will the policy be avoided if it is merely a representation of the parties' own expectation, opinion, and belief; or if it is immaterial and does not affect the risk; or if the insurer has not been deceived; or if it is made concerning facts which lie as much within the knowledge of the insurer as the insured, and the party making the representation believes it to be true at the time it is made (*a*). But if the underwriter has been thrown off his guard and prevented from making those inquiries which he would otherwise have made, the insured will be precluded from suing upon the policy, although the means of information may be within reach of the underwriter (*b*). A fraudulent misrepresentation, made to the first underwriter in a material point affecting the risk, is considered as

(*r*) *Hobbs* v. *Henning*, 34 L. J. C. P. 117; 17 C. B. N. S. 791; and see *Chavasse, Ex parte*, 34 L. J. Bk. 17.

(*s*) *Bolton* v. *Gladstone*, 5 East, 155; *Baring* v. *Clagett*, 3 B. & P. 201; *Garrels* v. *Kensington*, 8 T. R. 230.

(*t*) *Dalgleish* v. *Hodgson*, 5 M. & P. 407; 7 Bing. 504; *Hobbs* v. *Henning*, *supra*.

(*u*) *Tabbs* v. *Bendelack*, 3 B. & P. 207, *n*.

(*x*) *Weston* v. *Emes*, 1 Taunt. 115.

(*y*) *Post*, pp. 1173, 1174; *Macdowall* v. *Fraser*, 1 Doug. 260.

(*z*) *Edwards* v. *Footner*, 1 Campb. 530.

(*a*) *Driscol* v. *Passmore*, 1 B. & P. 204; *Hubbard* v. *Glover*, 3 Campb. 313; *Bowden* v. *Vaughan*, 10 East, 415; *Flinn* v. *Headlam*, 9 B. & C. 693; *post*, p. 1173.

(*b*) *Mackintosh* v. *Marshall*, 11 M. & W. 116; *post*, p. 1174.

a misrepresentation to every underwriter who underwrites the policy after him; because the obtaining of the signature of the first underwriter weighs with the others, and induces a misplaced confidence; but a misrepresentation to an intermediate underwriter has been held not to extend to the others (c).

Concealment of circumstances materially affecting or enhancing the risk to be incurred by the insurer or underwriter avoids all policies of assurance, and prevents the insured from recovering even in respect of a loss wholly unconnected with the circumstance concealed (d). The rule is that *all facts* should be disclosed which are material to enable the underwriter to judge whether he shall accept the risk, and at what rate, not that merely facts should be disclosed which are material to the risk (e). Thus the non-disclosure of the fact that goods are insured greatly in excess of their value will avoid the policy (f). The keeping back of any such circumstance avoids the policy, although the suppression may have occurred through mistake, "because the underwriter is deceived, and the risk run is really different from the risk understood and intended to be run at the time of the agreement" (g). A person proposing a marine insurance is bound to communicate every fact within his knowledge that is material, though, if a particular fact be actually or personally known to the underwriter at the time, he cannot afterwards set up as a defence to an action on the policy that that fact was not communicated; but, if a material fact be not communicated, which, though known to the underwriter once, was not present to his mind at the time of effecting the insurance, the non-communication affords a good defence to the underwriter; and it is not enough for the insured to show that the particulars supplied by him, coupled with the underwriter's previous knowledge, would, if the underwriter had given sufficient consideration to the subject, have brought to his mind the material fact not communicated (h). In the case of a time policy, if the insured wilfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time policy covers part, in an unseaworthy state, the insurance will be void on the ground of the concealment of a material circumstance (i). If the insured has received a doubtful account of the loss of his ship

(c) *Barber* v. *Fletcher*, 1 Doug. 306; *Sibbald* v. *Hill*, 2 Dow, 266; *Forrester* v. *Pigou*, 1 M. & S. 13; *Bell* v. *Carstairs*, 2 Campb. 543.

(d) *Seaman* v. *Fonerau*, 2 Str. 1183; *Fitzherbert* v. *Mather*, 1 T. R. 12; *Hodgson* v. *Richardson*, 1 W. Bl. 463; *Traill* v. *Baring*, 33 L. J. Ch. 521; *post*, pp. 994, 995.

(e) *Rivaz* v. *Gerussi*, 6 Q. B. D. 222.

(f) *Ionides* v. *Pender*, L. R. 9 Q. B. 471.

(g) *Carter* v. *Boehm*, 3 Burr. 1910; *Mercantile Steam Ship Co* v *Tyser*, 7 Q. B. D. 73; *post*, p. 995.

(h) *Bates* v. *Hewitt*, L. R. 2 Q. B. 595

(i) Parke, B., *Gibson* v. *Small*, 4 H. L. C. 408

such as "that a ship similar to his has been captured," and neglects to disclose the intelligence to the underwriter, the policy will be void (*k*); and so it will, if the assured keeps back any fact which, if disclosed, would in all probability have caused the underwriter to charge a higher premium (*l*); such as that the captain's judgment in the navigation of the vessel has been fettered and restricted by some unusual private instructions (*m*), or that the ship is a missing ship out of her time (*n*), or that she had encountered tempestuous weather, and that another ship that sailed long before her had arrived (*o*), or that she had taken the ground or struck on a rock, at an antecedent period, and had not been since surveyed or repaired (*p*), or that she had been met at sea in a leaky state (*q*), or had missed joining convoy and been driven out to sea (*r*), or that hostile privateers had been seen in pursuit of her (*s*), or that she was intended to be employed in a foreign smuggling transaction, or to carry simulated papers. But the insured or the party effecting the policy, is not bound to disclose "loose rumours gathered together no one knows how" (*t*), nor matters which lie as much within the knowledge of the underwriter as of the party effecting the insurance, nor such things as it is the business of the underwriter to know or find out for himself; such as the ordinary risks attendant upon particular speculations or adventures, the usages of trade, the dangers of particular seas and rivers, the probability of hostilities between different foreign states, nor the build, age, history, or capabilities of the ship, although, if questions are put to him upon any of these points, he is bound to answer to the best of his information and belief, and, if he knowingly states that which is false, he is guilty of a fraudulent misrepresentation which avoids the policy (*u*). The insured is not bound to disclose to the underwriter the time of the ship's sailing, or to say whether she has sailed or not, unless the ship is a missing ship. "If the underwriter wants to know he ought to enquire" (*x*). If the insured, at the time he effects the insurance, knows that the loss insured against has taken place, this is obviously a downright fraud, which avoids the policy; but, if he does not know of the loss, the validity

(*k*) *Da Costa* v. *Scandret*, 2 P. Wms. 169.

(*l*) *Willes* v. *Glover*, 1 B. & P. N. R. 16.

(*m*) *Middlewood* v. *Blakes*, 7 T. R. 162.

(*n*) *M'Andrew* v. *Bell*, 1 Esp. 373.

(*o*) *Kirby* v. *Smith*, 1 B. & Ald. 672; *Elton* v. *Larkins*, 8 Bing. 198; *Bridges* v. *Hunter*, 1 M. & S. 20.

(*p*) *Gladstone* v. *King*, 1 M. & S. 35; *Russell* v. *Thornton*, 4 H. & N. 788; 6 H. & N. 140; 30 L. J. Ex. 69; *Holland* v. *Russell*, 4 B. & S. 14; 32 L. J. Q. B. 297.

(*q*) *Lynch* v. *Hamilton*, 3 Taunt. 37; *Lynch* v. *Dunsford*, 14 East. 494.

(*r*) *Sawtell* v. *Loudon*, 5 Taunt. 359.

(*s*) *Beckwaite* v. *Nalgrove*, cited 3 Taunt. 41.

(*t*) *Durrell* v. *Bederley*, Holt, N. P. 285.

(*u*) *Carter* v. *Boehm*, 3 Burr. 1905; *Haywood* v. *Rodgers*, 4 East, 597; *Freeland* v. *Glover*, 7 East, 464; *Harrower* v. *Hutchinson*, L. R. 5 Q. B. 584.

(*x*) *Fort* v. *Lee*, 3 Taunt. 381.

of the insurance will depend upon the terms of the particular policy. If the insurance is on goods alleged to be on board a particular vessel, and no such goods or vessel exist at the time the policy is effected, the contract is nugatory, and the risk upon it never attaches. But, if the policy is on goods "lost or not lost," the indemnity extends, as we have before seen, to all past as well as future losses. If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship or cargo, purposely omits to discharge this duty, and the principal, being thus left in ignorance of a fact material to be communicated to the underwriter, effects an insurance, the insurance is void on the ground of concealment (*y*); and the agent ought to communicate with the principal by electric telegraph, where that means of communication is in general use (*z*). Where the agent innocently omits his duty in this respect, the policy is not void (*a*). But, when the slip has been initialed, the insured need not communicate to the underwriters facts which come to his knowledge afterwards, but before the policy is completed (*b*).

Although it is fraud in an insurer to insure a vessel which he knows to be lost, yet if an insurance has been effected before the loss but without his authority, he may ratify such insurance although he knows of the loss (*c*).

Of the risks covered by the policy—Custom and usage.—Everything done in the usual course of navigation and trade is presumed to have been foreseen and in contemplation by the parties to every contract of insurance at the time they entered into the engagement. Therefore, where a vessel engaged in the China trade was heeled down in an estuary, to be cleaned and refitted for the return voyage to England, and the tackle was put on a sandbank and there accidentally burnt, and it was shown to be customary for vessels in that trade, and engaged in that particular navigation, to re-fit and prepare for the home voyage in the same manner, it was held that the insurer was bound to make good the loss (*d*). If the policy is effected on the ship, tackle, boats, and furniture, and it is the custom to sling boats over the quarter outside the ship, the underwriter will be responsible for a boat lost by being so slung;

(*y*) *Fitzherbert* v. *Mather*, 1 T. R. 12, 16; *Gladstone* v. *King*, 1 M. & S. 35. These decisions have been dissented from by Mr. Justice Story, *Ruggles* v. *General Interest Insurance Co.* (4 Mason's Rep. 74), but have been upheld in *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; 36 L. J. Q. B. 225.

(*z*) *Proudfoot* v. *Montefiore*, *supra*.

(*a*) *Stribley* v. *Imperial Marine Insurance Co.*, 1 Q. B. D. 507.

(*b*) *Cory* v. *Patton*, L. R. 7 Q. B. 304; 41 L. J. Q. B. 195, n; *Lishman* v. *The Northern Maritime Insurance Co.*, L. R. 8 C. P. 216; 42 L. J. C. P. 108.

(*c*) *Williams* v. *North China Ins. Co.*, 1 C. P. D. 757, C. A.

(*d*) *Pelly* v. *Royal Ex. Ass. Co.*, 1 Burr. 341.

for every underwriter is presumed to be acquainted with the practice of the trade he insures, and, "if he does not know, he ought to inform himself" (*e*). If liberty of "unloading and re-shipping" is expressly given by the policy, that must be taken to mean an unloading and re-shipping according to the usage of the trade; and, therefore, if it is the custom to put goods on board a store-ship to await the arrival of a vessel into which they can be re-shipped, and the goods are lost in such store-ship, the underwriters will be responsible (*f*). If it is the custom, for vessels insured "to depart with convoy," to sail from the loading port without convoy to the general place of rendezvous for ships wanting convoy, and a vessel is captured, whilst proceeding thither unaccompanied to obtain convoy in the customary mode, the underwriters will be responsible for the loss (*g*).

Deck cargoes.—If it is the known custom of the captains and masters in any particular trade to carry deck cargoes, and such a cargo is insured and washed overboard, the underwriter will be bound to make good the loss; but, as goods thus carried are exposed to greater hazard than goods carried in the ordinary way they will be discharged from liability, unless the custom is clearly established, or the underwriters have express notice of the increased risk (*h*). But as a rule deck cargoes jettisoned are not entitled to general average contribution (*i*). By the 16 & 17 Vict. c. 107, s. 170—172 (see also 39 & 40 Vict. c. 80, ss. 13, 24, and 43 & 44 Vict. c. 43), deck cargoes are prohibited at certain periods of the year in vessels sailing from British ports in North America. A policy of insurance, therefore, entered into for the express purpose of protecting what the law has prohibited will be invalid (*k*); but the statute does not make the voyage absolutely illegal so as to affect innocent persons. It must be shown that the policy was effected with full knowledge by the insured that the goods were to be placed on deck, and that the vessel was to sail during the prohibited period; and the knowledge of the ship-master is not the knowledge of the ship-owner (*l*). A custom that underwriters are not liable under the ordinary form of policy for general average in respect of the jettison of goods stowed on deck is a valid custom and does not contradict the terms of the policy (*m*).

(*e*) *Blackett* v. *Royal Ex. Ass. Co.*, 2 C. & J. 249; *Noble* v. *Kennoway*, 2 Doug. 513.

(*f*) *Tiernay* v. *Etherington*, cited 1 Burr. 346.

(*g*) *Gordon* v. *Morley*, 2 Str. 1265; *Warwick* v. *Scott*, 4 Campb. 62.

(*h*) *Milward* v. *Hibbert*, 3 Q. B. 120; *Miller* v. *Titherington*, 30 L. J. Ex. 217; 31 L. J. Ex. 363; 6 H. & N. 278; 7 H. & N. 954.

(*i*) *Wright* v. *Marwood*, 7 Q. B. D. 62; see *ante*, p. 515.

(*k*) *Cunard* v. *Hyde*, 29 L. J. Q. B. 6; 2 El. & El. 1.

(*l*) *Cunard* v. *Hyde*, E. B. & E. 670; 27 L. J. Q. B. 408; *Wilson* v. *Rankin*, 34 L. J. Q. B. 66; 6 B. & S. 208; 35 L. J. Q. B. 87; L. R. 1 Q. B. 162; *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581.

(*m*) *Miller* v. *Tetherington*, 7 H. & N. 954; 31 L. J. Ex. 363.

Intermediate voyages—Custom and usage.—On fishing voyages to the American seas, it is customary for vessels, after the termination of the outward voyage, to be employed in banking or fishing off the coasts of Newfoundland before they return; and, if a vessel is insured for the outward and homeward voyage, the insurance will cover and protect the vessel during the intervening period occupied by fishing, if she is not detained longer than is customary and usual (*n*). If it is the custom, when several empty vessels arrive together at the port of lading and cannot all find cargoes, to employ some of them on a short intermediate voyage, and a vessel insured for the outward and homeward voyage is so employed, and then takes on board her return cargo and is lost on the homeward voyage, the liability of the underwriters in respect of the loss will not be discharged; but a usage for the employment of the vessel for an unreasonable or unnecessary space of time will not be sanctioned (*o*). Where a ship was insured "at and from Bengal to any ports or places whatsoever beyond the Cape of Good Hope, forwards and backwards, and during her stay at each place, until her arrival at London," and it was proved to be the notorious usage of the East India trade to detain vessels in the Indian seas for a reasonable period, extending to several months, for the purpose of employing them on intermediate country voyages in those seas before they make the return voyage to Europe, it was held that the underwriters must be deemed to have contracted with reference to the known usage, and that the customary intermediate voyage was covered and protected by the policy (*p*). The usages established amongst the underwriters at Lloyd's cannot affect their liability upon the policy, unless it be shown that the assured was cognizant of them, or was in the habit of transacting business at Lloyd's (*q*).

Loss by perils of the seas—Negligence and misconduct of the master or mariners.—The risks that the underwriters generally take upon themselves by the common form of policy are perils of the sea, fire, pirates, letters of mart and countermart, takings at sea, restraint of princes and people, barratry of the masters and mariners, &c. We have already seen that, as between the carrier of goods by sea and the owner of such goods, losses which, though caused immediately by the violence of the winds and waves, are imputable to the ignorance or negligence of the master or mariners, are not losses by perils of the sea (*ante*, p. 497); but a different rule prevails in cases of insurance, where the immediate

(*n*) *Vallance* v. *Dewar*, 1 Campb. 503.

(*o*) *Ougier* v. *Jennings*, 1 Campb. 505, n. (*a*); *Phillips* v. *Irving*, 8 Sc. N. R. 7.

(*p*) *Salvador* v. *Hopkins*, 3 Burr. 1707.

(*q*) *Scott* v. *Irving*, 1 B. & Ad. 6[illegible] *Gabay* v. *Lloyd*, *ante*, p. 2[illegible]5.

and not the remote cause of loss is regarded, so that if a vessel is stranded and wrecked through the incompetency or misconduct or barratry of the captain and crew, the loss is nevertheless, as between the insurer and the insured, a loss by perils of the sea, and is covered by the policy, provided the insured, if the insurance is on the vessel itself, had appointed a sufficient crew, and a captain who appeared to have competent skill at the commencement of the voyage (*r*). And generally a loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy (*s*). If, by reason of the wilful extinguishment of a particular light by a hostile force, the captain miscalculates his position, and the ship goes ashore, the loss is a loss by perils of the sea, although it might never have occurred if hostilities had not broken out (*t*). And, if a ship is wrecked on a foreign coast, and the cargo gets into the hands of the authorities there, and the owners, in order to recover it, are compelled to pay a sum of money to such authorities, the loss of that sum, being an immediate consequence of the wreck, is a loss by perils of the sea (*u*). A loss occasioned by another vessel's running down the ship insured is a loss by perils of the sea, although there has been negligence and want of skill on the part of the master and crew of the ship insured (*x*). If, in the collision, both vessels are injured, and the owners are compelled by the rules of the Court of Admiralty to divide the loss, and the ship insured has done more damage than she has received, and the owners are obliged to pay the balance, this is not then a loss by perils of the sea, as the sea is not the proximate cause thereof: "it grows out of an arbitrary provision in the law of nations from views of general expediency, and can no more be charged upon the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against" (*y*). If a ship takes the ground on entering or leaving port, the loss is, as we have before seen, a loss by perils of the sea; but, if she is hove down on a beach within the tideway, or placed in a graving dock, to be repaired or cleaned, and rolls over or is blown over by the wind, and is bilged or damaged, the loss is not a loss from perils of the sea; for the sea is not in such a case the proximate cause of the mischief (*z*).

(*r*) *Redman* v. *Wilson*, 14 M. & W. 483.
(*s*) *Dudgeon* v. *Pembroke*, 2 Ap. Cas. 284; *West Indian Teleg. Co.*, v. *Home Ins. Co.*, 6 Q. B. D. 51.
(*t*) *Ionides* v. *Univ. Marine Ins. Co.*, 14 C. B. N. S. 259; 32 L. J. C. P. 170.
(*u*) *Dent* v. *Smith*, L. R. 4 Q. B. 414; 38 L. J. Q. B. 144.
(*x*) *Smith* v. *Scott*, 4 Taunt. 126.
(*y*) *De Vaux* v. *Salvador*, 4 Ad. & E. 420.
(*z*) *Thompson* v. *Whitmore*, 3 Taunt. 227; *Phillips* v. *Barber*, 5 B. & Ald. 161. See *Davidson* v. *Burnand*, L. R. 4 C. P. 117.

The collision clause now frequently inserted in policies to secure the shipowner against damage, which he may be compelled to pay for injury done to others by his vessel coming into collision with another, does not extend to damages paid by the insured in respect of loss of life or personal injury (*a*). Nor does it cover the extra costs which the insured may be put to when he is sued for damages for a collision but gets a verdict, nor can these costs be recovered under the suing and labouring clause (*b*).

Sea risks covered by the policy.—Loss or damage resulting from ordinary wear and tear, or from some inherent vice or defect (*c*), is not covered by the policy. There must be something fortuitous or accidental in the nature of the damage (*d*). Therefore, where a vessel moored in a river waiting her turn to discharge her cargo floated when the tide was in and took the ground when the tide was out, and so remained for several days, when she became hogged or strained, and the cabin doors would not shut, and she was obliged to go into dock to be thoroughly repaired, it was held that there was nothing in the disaster which could be referred to the perils insured against. The tide rose and fell as the tide always does; there was no *casus fortuitus;* and the underwriters were not answerable (*e*). If a vessel founders at sea in consequence of her hull having been eaten into by worms during the voyage, the loss is a loss by perils of the sea, as the sea is the proximate cause of the mischief. But, if the vessel gets safe to some intermediate port at which she was authorised to touch, and is then unable to put to sea again in consequence of the ravages made in her hull by the worms, or in consequence of her bottom having been eaten into by rats while she was lying in port, the loss is not a loss from perils of the sea, but a loss from the ravages of worms and rats, as the worms and the rats are then the proximate, and not the remote cause of the mischief (*f*).

Losses from old age and decay and other causes,—perils of the sea.—If a vessel is old, and her timbers decay during the voyage, and the bolts and fastenings become loosened, and she founders in a gale of wind which a younger and stouter vessel would in all probability have ridden out in safety, the loss is a loss by perils of the sea (*g*); but, if she gets safe into port and there drops to pieces, or is found to be unfit to go to sea again from age and decay, the loss is not a loss from perils of the sea, but from old age.

(*a*) *Taylor* v. *Dewar*, 5 B. & S. 58; 33 L. J. Q. B. 141.

(*b*) *Xenos* v. *Fox*, L. R. 4 C. P. 665.

(*c*) Byles, J., *Koebel* v. *Saunders*, 17 C. B., N. S. 79; 33 L. J. C. P. 312.

(*d*) *Paterson* v. *Harris*, 1 B. & S. 336; 30 L. J. Q. B. 354.

(*e*) *Magnus* v. *Buttemer*, 11 C. B. 876; 21 L. J. C. P. 119; *Corcoran* v. *Gurney*, 1 Ell. & Bl. 456.

(*f*) *Hunter* v. *Potts*, 4 Campb. 204.

(*g*) *Phillips* v. *Nairne*, 4 C. B. 350.

Where a policy was effected on merchandise laden on board a vessel, and the ship was disabled in a storm and obliged to put into port to refit, and the master, in order to defray the expense, sold part of the goods, and applied the proceeds in payment of such expense, it was held that, as it was want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods, the loss was not a loss from a peril of the sea (*h*). Where a vessel went ashore and was wrecked in consequence of two of the crew being seized and carried off by a pressgang whilst they were making fast a line to the quay, it was held that, as the immediate cause of the loss was the stranding of the vessel, it was a loss by perils of the sea within the meaning of the policy of insurance, although it had been brought about and occasioned by the press-gang (*i*). If a cargo of living animals is insured "free from mortality and jettison," and the beasts are killed by the rolling of the ship in a storm, the underwriter is nevertheless liable, as the exception extends only to death from natural causes, and the death in such a case arises immediately from a peril of the sea (*k*). If a cargo of hides has been insured, and the upper portion of the cargo has been injured from putrefying exhalations arising from the decomposition of the lower hides occasioned by the action of sea water, the injury to the upper hides is a loss occasioned by perils of the sea; and, if the cargo consists partly of corn or tobacco and partly of hides, and the sea water renders the hides putrid, and the putridity of the hides injures the corn or the tobacco, such injury constitutes a loss by perils of the sea (*l*). But the insurer is not responsible for loss arising from damage to the reputation of goods from suspicion of injury by salt water where they have not in fact been so injured (*m*). If a cargo of hemp or cotton is put on board in a damp and dangerous state, and it ferments and catches fire or becomes damaged, this is not a loss by perils of the sea, but from an inherent defect in the article itself (*n*); nor is it a loss by perils of the sea where meat is spoiled by reason of mere delay occasioned by stormy weather (*o*). A loss from capture or robbery by pirates is a loss by "perils of the sea" (*p*). If a ship is captured and taken in tow by a man-of-war, and is thereby exposed to a tempestuous sea which injures goods on

(*h*) *Powell* v. *Gudgeon*, 5 M. & S. 437; *Sarquy* v. *Hobson*, 2 B. & C. 7; In such a case the owner of the goods must resort to the shipowner for an indemnity against the loss; *ante*, p. 494.

(*i*) *Hodgson* v. *Malcolm*, 5 B. & P. 336.

(*k*) *Lawrence* v. *Aberdein*, 5 B. & Ald. 107.

(*l*) *Montoya* v. *Lond. Ass. Co.*, 6 Exch. 451.

(*m*) *Cator* v. *Gt. Western Insurance Co. of New York*, L. R. 8 C. P. 552.

(*n*) *Boyd* v. *Dubois*, 3 Campb. 132; Byles, J., *Koebel* v. *Saunders*, 17 C. B. N. S. 79; 33 L. J. C. P. 312.

(*o*) *Taylor* v. *Dunbar*, L. R. 4 C. P. 206.

(*p*) 2 Roll. Abr. 248, fol. 10.

board, the loss may be treated either as a loss by perils of the sea or a loss by capture (*q*). If a vessel has sailed out of port on her intended voyage, and does not arrive at her port of destination within a reasonable period, and no intelligence can be obtained respecting her, this is evidence of the loss of the vessel from perils of the sea (*r*). Where one of the risks insured against was "all risks incident to steam navigation," and by failure of machinery the ship was detained so long that the charterers cancelled their charter-party under the terms contained in it, it was held that the loss was occasioned by such cancelling and not by the breaking down of the machinery (*s*).

Perils of fire and jettison.—When fire is one of the perils insured against, "and the ship is lost by fire, it is of no consequence whether this was occasioned by a common accident, or by lightning, or by an act done in duty to the state," to prevent the vessel from falling into the hands of the enemy (*t*), or by the gross negligence of the captain or crew (*u*). "Fire is still the *causa causans*; and the loss is covered by the policy." Where a vessel insured against fire was described in the policy as "lying in the Victoria Dock, with liberty to go into a dry dock," it was held that the ship was not covered by the policy whilst she was lying in the Thames not *in transitu* to the dry dock (*v*). When jettison is one of the risks insured against, the policy will cover a loss occasioned by the throwing of the goods overboard to prevent their falling into the hands of the enemy (*x*). It is not an implied condition that the insured on goods must claim contribution of the other parties for a jettison before he can demand indemnity from his underwriters. He may demand it of them in the first instance; and, when the underwriters have paid him, they will be entitled to stand in his place with respect to the general average contribution (*y*).

Loss by capture and seizure.—Where an insurance was effected against capture only, and the vessel was driven on the enemies' coast in a stiff gale of wind, but received no damage, and, whilst she remained stranded on the shore, she was seized and confiscated, it was held that this was a loss by capture (*z*). But, if the vessel had been disabled or totally wrecked, it would have been a loss

(*q*) *Hagedorn* v. *Whitmore*, 1 Stark. 157.

(*r*) *Green* v. *Brown*, 2 Str. 1199; *Koster* v. *Reed*, 6 B. & C. 19.

(*s*) *Merc. Steam Ship Co.* v. *Tyser*, 7 Q. B. D. 73.

(*t*) *Gordon* v. *Rimmington*, 1 Campb. 123.

(*u*) *Busk* v. *Royal Ex. Ass. Co.*, 2 B. & Ald. 73.

(*v*) *Pearson* v. *Commercial Un. Ass. Co.*, 33 L. J. C. P. 85; 15 C. B. N. S. 304; L. R. 8 C. P. (Ex. Ch.) 548; 42 L. J. C. P. (Ex. Ch.) 548; 1 Ap. Cas. 498.

(*x*) *Butler* v. *Wildman*, 3 B. & Ald. 398.

(*y*) *Dickenson* v. *Jardine*, L. R. 3 C. P. 639.

(*z*) *Green* v. *Elmslie*, Peake, 278.

from perils of the sea (a). The circumstance that the capture has been occasioned by the barratry of the master, or that it is an illegal capture, does not render the capture less a capture (b). As insurances on voyages to ports blockaded by a British squadron are illegal, no action can be maintained for indemnity in respect of losses resulting from an attempt to break such a blockade, if it appears that the party bringing the action knew of the blockade and intended to break it at the time he effected the insurance. If he had no knowledge of the blockade or no intention to break it, or had fair ground to think that the blockade would be raised by the time the vessel reached her destination, the insurance will be valid (c). Insurances by British subjects of foreign vessels and cargoes from capture do not extend to captures made by order of the government of this country; for all insurances of enemies' property against *British* capture are null and void, as being contrary to the public policy of the law (d). And in every policy of insurance there is an implied term or proviso, that the insurance shall not extend to cover any loss from capture of enemies' property by the British government on the breaking out of hostilities (e). But the property of neutrals will be covered and protected by the policy (f); and so will the property of all persons who have received a license to trade from the crown (g). If a foreigner consigns goods to merchants in this country on his own account and risk, and the consignees make advances to such foreign consignor in respect of the consignment, and insure the goods on his account, and a war breaks out which prevents the consignor from suing upon the policy in the courts of this country, the consignees cannot avail themselves of the policy for the purpose of recovering the amount of their advances from the underwriters, although it was made in their names as interest might appear. They should have insured their interest in the first instance (h). When a capture has been made, whether legal or not, the underwriters are liable for the expenses of a compromise made *bonâ fide* to prevent the ship's being condemned as a prize (i). If the capture does not take place until after the goods have been landed, the underwriters are not liable, as the voyage is terminated, although the goods may never have come to the possession of the consignees (k).

(a) *Hahn* v. *Corbett*, 2 Bing. 205; *Ionides* v. *Universal Marine Ins. Co.*, *ante*, p. 692.

(b) *Arcangelo* v. *Thompson*, 2 Campb. 21; *Powell* v. *Hyde*, 5 Ell. & Bl. 611; *Palmer* v. *Naylor*, 10 Exch. 382; 23 L. J. Ex. 323; *Cory* v. *Burr*, 8 Q. B. D. 313, 9 Q. B. D. 463.

(c) *Harratt* v. *Wise*, 9 B. & C. 712; *Naylor* v. *Taylor*, *ib.* 718.

(d) *Furtado* v. *Rogers*, 3 B. & P. 191; *Esposito* v. *Bowden*, 7 El. & Bl. 763.

(e) *Brandon* v. *Curling*, 4 East, 417; *Kellner* v. *Le Mesurier*, *ib.* 396.

(f) *Visger* v. *Prescott*, 5 Esp. 186.

(g) *Usparicha* v. *Noble*, 13 East, 332.

(h) *Conway* v. *Gray*, 10 East, 536; but see *Aubert* v. *Gray*, 3 B. & S. 163; 32 L. J. Q. B. 50.

(i) *Berens* v. *Rucker*, 1 W. Bl. 313.

(k) *Brown* v. *Carstairs*, 3 Campb. 160.

Restraints and detainments of kings, princes and people.— The word "people" comprehends nations in their collective capacity, and not bodies of insurgents acting in opposition to their rulers. "It means the supreme power of the country, whatever it may be;" and, therefore, if a corn vessel is seized and detained by a hungry mob or a party of rebels, the loss resulting therefrom is not covered by the policy; for it is not a detention by "the people" (*l*). But, if it be made by order of the executive officers of a foreign government, or by any foreign prince, potentate, or power, it is otherwise (*m*). The clause does not extend to losses by detention by the British government, or by officers acting under its authority, unless the detention be unlawful. A foreigner, therefore, cannot sue any British subject in the courts of this country for such losses (*n*), unless he can show that it was an erroneous or unlawful detention (*o*). The insurance against the risk of detention by princes will not extend to cover any loss happening in the course of any contraband adventure in which the goods become liable to seizure as forfeited by the laws of this country (*p*), or by the laws of any foreign country, unless the underwriter has notice of the intention of the insured to engage in a foreign smuggling transaction, and accepts the increased risk, in which case he will be liable upon the policy, as our courts do not take notice of the revenue laws of foreign governments (*q*). If the detention arises from the captain's having carried simulated papers, or from his having neglected to provide proper national documents for his vessel, the underwriters will be discharged (*r*), unless they have received notice of the intention so to trade, and have accepted the increased risk, and the trading with simulated or defective papers is not unlawful by the laws of this country, but is resorted to in the furtherance of British commerce (*s*). A detention from fear of an embargo at the port of destination is not a detention within the meaning of the policy. And, if, by reason of a hostile embargo suddenly laid on the destined port, the further prosecution of the voyage becomes impracticable, and the ship returns, and the voyage is lost, the loss is not a loss by restraint or detainment (*t*). Goods are restrained or detained where they are by the application of a hostile force prevented from being carried to their destination, as where they are in a blockaded port or a besieged town. Thus, where goods insured from Shanghai to London *viâ* Marseilles

(*l*) *Nesbitt* v. *Lushington*, 4 T R. 783.
(*m*) *Rotch* v. *Edie*, 6 T. R. 413.
(*n*) *Touteng* v. *Hubbard*, 3 B. & P. 291.
(*o*) *Mullet* v. *Shedden*, 13 East, 304; *Lozano* v. *Janson*, 28 L. J. Q. B. 337; 2 El. & El. 60.
(*p*) *Brandon* v. *Curling*, 4 East, 416.
(*q*) *Planche* v. *Fletcher*, 1 Doug. 251; *Holman* v. *Johnson*, 1 Cowp. 343.
(*r*) *Bell* v. *Carstairs*, 14 East, 374.
(*s*) *Bazett* v. *Meyer*, 5 Taunt. 824.
(*t*) *Forster* v. *Christie*, 11 East, 205.

arrived at Paris, but that city was immediately afterwards so completely surrounded and invested by the German armies who were then besieging it that it was impossible to remove the goods from it, it was held that there was a loss by "restraint of princes," and that the insured was justified in abandoning the goods (*u*). Every foreigner is deemed to be a party to the public authoritative acts of his own government; and a detention by order of such government is as much his act as if it proceeded immediately from himself. He cannot, therefore, make a loss resulting from such a detention the foundation of a claim for indemnity against any British subjects in the courts of this country (*x*), unless the insurance is expressly directed against such a contingency, and the insurer has expressly agreed to take upon himself such a risk (*y*). If the detention of goods takes place whilst they are on board the vessel at the port of destination, before the risk in the policy ceases, the underwriters are responsible; but, if the goods have been safely landed and are then seized, they are discharged from liability (*z*). The underwriters are sometimes exempted, by the express terms of the policy, from responsibility in case of confiscation, seizure, and capture in port. In these cases, whether the vessel was or was not at her port of discharge is a question of fact for a jury, to be determined by reference to custom and usage, as defining the limits of the port (*a*).

Peril of barratry of the master and crew.—Barratry, a term derived from the Italian word "barrattare," to cheat, may be defined to be any species of fraud or cheating by which the owners or insurers are injured (*b*), such as running away with the ship; or fraudulently carrying her out of her course; or sinking or deserting her; or fraudulently defeating or delaying the voyage; embezzling the cargo; smuggling (*c*); cruising for and taking prizes without the sanction and authority of the owner (*d*); sailing out of port without paying port dues, or in breach of an embargo, whereby the vessel or cargo is confiscated or lost; trading with alien enemies; or wilfully and knowingly sailing to a blockaded port, whereby the ship is seized by a British cruiser (*e*); and the act may be barratry, although it was done by the captain with no view of benefiting

(*u*) *Rodocanachi* v. *Elliott*, L. R. 8 C. P. 649; 9 C. P. 518.

(*x*) *Campbell* v. *Innes*, 4 B. & Ald. 423; but see *Aubert* v. *Gray*, 32 L. J. Q. B. 50; 3 B. & S. 163.

(*y*) *Simeon* v. *Bazett*, 2 M. & S. 98.

(*z*) *Brown* v. *Carstairs*, 3 Camph. 160.

(*a*) *Reyner* v. *Pearson*, 4 Taunt. 662; *Levy* v. *Vaughan*, *ib.* 387; *Levin* v. *Newnham*, *ib.* 722; *Mellish* v. *Staniforth*, 3 Taunt. 499.

(*b*) *Vallejo* v. *Wheeler*, 1 Cowp. 154; *Earle* v. *Rowcroft*, 8 East, 126.

(*c*) *Dixon* v. *Reid*, 5 B. & Ald. 597; *Hucks* v. *Thornton*, Holt, N. P. 30; *Roscow* v. *Corson*, 8 Taunt. 684; *Ross* v. *Hunter*, 4 T. R. 33; *Havelock* v. *Hancil*, 3 T. R. 277.

(*d*) *Moss* v. *Byrom*, 6 T. R. 379.

(*e*) *Goldschmidt* v. *Whitmore*, 3 Taunt. 508.

himself, but of securing some advantage for the shipowners. But barratry does not in our own law include simple negligence, unaccompanied by culpable misconduct, nor any act done in obedience to the commands of the shipowner, or from ignorance, or a mere error of judgment, or a mistake by the captain of the tenor of his instructions (*f*). "Barratry," it has been observed, "is an act of fraud, not directed against the owner of the goods which are lost, but against the owner of the ship; and, if the owner of the ship (he being sole owner) concurs in the act which causes the loss, it takes from it the character of barratry." But, if the owner of the goods is the freighter or charterer of the vessel, and the ship is under his orders and control, he is *pro hâc vice* the owner of the vessel, and the fraudulent conduct of the master and crew amounts to barratry as between him and them, although the shipowner may be a party to the fraud. A master who is a sole owner cannot commit barratry, because he cannot commit a fraud against himself; but, if a master, being also part owner, makes away with the ship in fraud of the other owners, that is barratry (*g*). Where barratry of the master was insured against, and the ship was warranted "free from capture and seizure," and the ship was seized in consequence of barratry, it was held that the loss was due to the seizure not the barratry (*h*).

Perils, losses, and misfortunes generally.—The clause generally inserted in policies extending the insurance to "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship, &c.," covers and protects all losses happening on the sea and in port, whilst the ship is in the due and customary prosecution of the voyage insured, and whilst the risk on the policy continues. If, therefore, a vessel is fired into and sunk by mistake the loss is within this "sweeping clause" of the policy. If a vessel is lost or injured in port, whilst the policy continues in force, the loss will be covered by this clause; but the general words thereof are restrained in construction to perils of the same kind as those more particularly enumerated in the policy (*i*). And, where meat becomes putrid by reason of delay caused by tempestuous weather,

(*f*) *Todd* v. *Ritchie*, 1 Stark. 240; *Stamma* v. *Brown*, 2 Str. 1174: *Phyn* v. *Royal Ex.*, 7 T. R. 505; *Grill* v. *The Gen. Iron Screw Collier Co.*, L. R. 1 C. P. 600; 35 L. J. C. P. 321; L. R. 3 C. P. 476; in the French law, "*Barraterie comprend toutes les especes, tant de dol, que de simple imprudence, defaut de soin et imperitie tant du patron que des gens de l'equipage.*" Poth. *Assurance*, No. 64.

(*g*) *Jones* v. *Nicholson*, 10 Exch. 28; 23 L. J. Ex. 330.

(*h*) *Cory* v. *Burr*, *ante*, p. 696.

(*i*) *Cullen* v. *Butler*, 5 M. & S. 464; *Phillips* v. *Barber*, 5 B. & Ald. 161; *Naylor* v. *Palmer*, 8 Exch. 739; *Davidson* v. *Burnand*, L. R. 4 C. P. 117.

it is not a loss within this clause (*k*). These general words will include damage by the explosion of a boiler (*l*).

Of the commencement of the risk.—If the policy is on a ship or goods "lost or not lost," the indemnity extends to all past as well as all future losses. It is the same as if, the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed that, if the goods at the time of the purchase had sustained any damage by the perils of the sea, he would make it good (*m*). Sometimes the risk is expressly appointed to commence from "the time of the vessel's being ready to sail," or "from the time of clearing," or "of her being ready for sea." When it is to commence "at and from" a particular place, it will attach immediately on her first arrival at the port in such a seaworthy condition as to be enabled to lie there in safety, although she is not safely moored, and will continue whilst she is lying at anchor preparing for the voyage for which she is insured (*n*). But, if there is any voluntary and unreasonable delay, the underwriter will be discharged; for his liability upon the policy is not to be subjected to the whim and caprice of a shipowner who may choose to let his ship lie and rot at her anchors (*o*). If there has been a delay in the ship's arrival at the place, it is a question for a jury whether the delay materially varied the risk (*p*); and, if it did, the policy did not attach (*q*). But the vessel must arrive "and have once been *at* the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches." The safety required is a physical safety from the perils insured against, and not a freedom from political danger (*r*). There is, in general, an express stipulation in all policies of insurance on goods and merchandise, to the effect that the risk upon the policy shall commence from the loading of the goods on board the ship. In this case, and whenever an insurance is effected on goods and merchandise laden on board a particular vessel, the risk on the policy does not commence until the goods are safely shipped and stowed on board. If they are lost by the upsetting of boats or lighters whilst they are being conveyed from the shore to the ship preparatory to the voyage, the underwriters will not be responsible for the loss. As to risk in landing from lighter after the voyage, see *post*, p. 704.

(*k*) *Taylor* v. *Dunbar*, L. R. 4 C. P. 206.

(*l*) *West India Teleg. Co.* v. *Home Ins. Co.*, 6 Q. B. D. 51.

(*m*) *Sutherland* v. *Pratt*, 11 M. & W. 312.

(*n*) *Haughton* v. *The Empire Marine Insurance Co.*, L. R. 1 Ex. 206; 35 L. J. Ex. 117.

(*o*) *Chitty* v. *Selwyn*, 2 Atk. 359; *Palmer* v. *Marshall*, 8 Bing. 79; *Smith* v. *Surridge*, 4 Esp. 25.

(*p*) *Hull* v. *Cooper*, 14 East, 479.

(*q*) *De Wolf* v. *Archangel Ins. Co.*, L. R. 9 Q. B. 451.

(*r*) *Parmeter* v. *Cousins*, 2 Campb. 237; *Bell* v. *Bell*, *ib.* 478.

Whenever, by the express terms of the policy, the adventure is to begin from the loading of goods on board at a particular place, the risk on the policy will not attach if no goods are taken on board at the place specified (*s*), or if the vessel is lost before she arrives at the port of loading (*t*); and the policy will not cover and protect goods previously taken on board, as the adventure had not commenced when those goods were received; "but this, being a strict construction, has been relaxed when there is anything on the face of the instrument to satisfy the Court that the policy was intended to cover goods previously on board" (*u*), and, therefore, if the policy is expressed to be made in continuation of a former policy, which former policy covered and protected the antecedent cargo, the goods previously laden on board, as well as those received on board at the subsequent place of loading designated in the subsequent policy, will be protected (*x*). And, if the adventure is to commence on the goods "wheresover loaded," the courts will give the words the largest signification, so as to cover all antecedent shipments (*y*). Where part of an antecedent shipment was taken out at the loading port mentioned in the policy as the port from whence the adventure was to commence, and the whole cargo was inspected by custom-house officers for adjusting duties which were paid on it at that port, and was then put on board again with the knowledge of the underwriter, this was held to be in substance a re-loading of the whole cargo, so as to make it a cargo laden on board at the loading port mentioned in the charterparty (*z*).

Of the duration and the termination of the risk.—It is generally expressly provided in the policy that the risk shall continue, as regards the ship, until she has arrived at her port of destination or port of discharge, and been moored at anchor in safety twenty-four hours, and, as regards the goods, until they have been safely discharged and landed. Where a ship was insured "at and from" Jamaica, and was lost in coasting from one port of the island to another, it was held that she was protected by the policy in moving from port to port in the discharge of her cargo, and in taking fresh cargo, in the prosecution of the outward and homeward voyage in the ordinary and usual manner (*a*). But a vessel is not protected in going about from port to port, or cruising round the whole island, in order to dispose of her cargo, in a manner that is not

(*s*) *Royal Ex. Ass. Co.* v. *McSwiney*, 19 L. J. Q. B. 222; 14 Q. B. 661.

(*t*) *Halhead* v. *Young*, 6 Ell. & Bl. 312; 25 L. J. Q. B. 290.

(*u*) *Mellish* v. *Allnutt*, 2 M. & S. 106; *Rickman* v. *Carstairs*, 5 B. & Ad. 663.

(*x*) *Bell* v. *Hobson*, 16 East, 243; *Joyce* v. *Realm Insurance Co.*, L. R. 7 Q. B. 580; 41 L. J. Q. B. 356.

(*y*) *Gladstone* v. *Clay*, 1 M. & S. 418.

(*z*) *Nonnen* v. *Kettlewell*, 16 East, 188; *Carr* v. *Montefiore*, 33 L. J. Q. B. 57, 257; 5 B. & S. 408.

(*a*) *Cruikshank* v. *Janson*, 2 Taunt. 301; *Warre* v. *Miller*, 4 B. & C. 538.

warranted by the ordinary usage and custom of trade, as the risk is thereby increased to the detriment of the underwriter to an extent not contemplated at the time the insurance was effected. If the policy is on the ship until her arrival at the last port of discharge, and several ports are named in the policy, some of which are blockaded, the risk on the policy will cease on the arrival of the vessel at the last unblockaded port (*b*). But, if the vessel deviates from the voyage insured and enters upon a fresh adventure, or goes to ports not named in the policy, through fear of the breaking out of hostilities, and of the ports of destination becoming hostile ports, the underwriters will be discharged (*c*). Where a ship was insured for the outward voyage "to all or any of the ports or places in the East Indies, China, or elsewhere, until arrived at the last place of discharge on the outward voyage," it was held that the outward voyage terminated as soon as the outward cargo had been discharged, and that the risk could not be prolonged so as to cover goods taken on board at intermediate places, to be carried onwards to the more distant ports or places named in the policy (*d*).

Where, in a policy of insurance on a vessel for the outward voyage, there is a clause giving her "liberty to touch, stay, &c., at any ports whatsoever to take on board and land goods," the clause will protect the vessel while she is stopping for the *bonâ fide* discharge of the outward cargo, and is at the same time availing herself of the opportunity of taking in merchandise, being at the time in the due prosecution of the outward voyage; but "the captain has no right to mix up together the two objects of disposing of the remnant of the outward cargo and procuring a homeward cargo at the risk of the underwriters on the outward voyage. When the disposal of the outward cargo ceases to be the sole occasion for his stay at a particular port, these underwriters are discharged" (*e*). If the party effecting the insurance is ignorant of the particular port at which the goods will be shipped, as well as of the name of the ship and of the species of the goods, he may protect himself against loss by a general insurance of goods of a certain value to be sent to him by sea whatever may be the ship they are sent in, or the place at which they are put on board (*f*).

Arrival at the port of destination—Mooring in safety (*g*).—

(*b*) *Doyle* v. *Powell*, 4 B. & Ad. 267.

(*c*) *Oliverson* v. *Brightman*, 8 Q. B. 781.

(*d*) *Richardson* v. *Lond. Ass. Co.*, 4 Campb. 94.

(*e*) Ld. Ellenborough, *Inglis* v. *Vaux*, 3 Campb. 437; *Moore* v. *Taylor*, 1 Ad. & E. 25.

(*f*) *Hunter* v. *Leathley*, 10 B. & C. 358.

(*g*) *Lindsay* v. *Janson*, 4 H. & N. 704.

The extent and limits of the "port of discharge" are regulated by custom and usage; and the term as used in policies of insurance includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. Where a ship's place of destination was "her Majesty's Dockyard at Deptford," and the vessel got to the dock gates, but could not get into the dock by reason of ice which blocked up the entrance, and she was accordingly moored in the river alongside the dock gates, and was there driven on shore and totally lost, it was held that the underwriters continued liable, as she had never been moored in safety at her place of destination within the terms of the policy (*h*). But, where a vessel was chartered for a voyage from Quebec to Wallasey Port, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo, and the vessel arrived in the Mersey and was towed abreast of Wallasey Port, but could get no further by reason of her great draught of water, and the captain then began to discharge the cargo in lumpers, and also discharged his crew, and after several days, when a considerable portion of the cargo had been discharged, the ship fell over on her side and was injured, it was held that the vessel had arrived at her place of destination, and that the risk on the policy ceased after she had been moored twenty-four hours in safety, although it appeared that the captain intended ultimately to carry the vessel into Wallasey Port with as much of the cargo as he could carry over the shallow part of the river intervening between his original anchorage and that port (*i*). If a vessel has sprung a leak or received her "death wound at sea," but comes into port and casts anchor in apparent safety for twenty-four hours, and the mischief is not discovered until after the expiration of the time limited for the continuance of the risk on the policy, the underwriter will nevertheless continue liable, as it is obvious that the vessel never was in reality moored in safety at all (*k*). But, although a ship is damaged, yet if she is not a mere wreck or in a sinking state at the time of her arrival, and is moored as a ship in the possession and control of her owners, she is "moored in safety" (*l*). If an embargo is laid on all English vessels at a foreign port, and the vessel enters in ignorance thereof, and remains at anchor twenty-four hours, and is subsequently seized, the underwriters are liable; "for she is in the

(*h*) *Samuel* v. *Royal Ex. Ass. Co.*, 8 B. & C. 123; *Stone* v. *Marine Ins. Co.*, 1 Ex. D. 81.

(*i*) *Whitwell* v. *Harrison*, 2 Exch. 127.

(*k*) *Meretony* v. *Dunlope*, cited 1 T. R. 260, where it is stated that the verdict was given for the insured, whereas the court, in *Knight* v. *Faith*, 19 L. J. Q. B. 517, treat the case as if the verdict had been for the insurer.

(*l*) *Lidgett* v. *Secretan*, L. R. 5 C. P. 198.

power of the enemy the very moment she enters the port, and is not for one minute moored in safety" (*m*). And if, by reason of quarantine regulations or other laws of the port, the vessel is not lawfully moored, but is liable to be sent out of port to perform quarantine, or to be examined or fumigated, the risk continues on the policy, although the vessel may have remained at anchor more than twenty-four hours before any actual removal takes place, and before the port regulations against her mooring are enforced (*n*). But, where a vessel, after being moored, remained in actual safety as a ship for twenty-four hours, and so that during those twenty-four hours her owners had complete and undisturbed possession of her, but was afterwards seized in consequence of the master having smuggled before her arrival, it was held that the terms of the policy were satisfied, and that the loss by the seizure was a loss after the termination of the risk (*o*).

Risks in landing the goods.—When the insurance is on goods and merchandise, it is generally expressly provided in the policy that the risk shall continue until the goods have been safely discharged and landed; but whether there is such a provision or not, the risk upon the policy will continue from the time of the loading of the goods on board to the time of their being actually landed at the port of destination (*p*). Any loss or damage, therefore, sustained in the transhipment of the goods from the vessel to the shore by the upsetting or stranding of boats or lighters, will have to be made good by the underwriters, provided the transhipment is made in the ordinary and usual course, and according to the usage of the port and trade (*q*), and is not made in the boats and lighters of the owner of the goods. If the latter sends his own lighters and servants for the goods and receives them, the underwriters will be discharged, as the voyage is terminated, and the risk on the policy ceases, as soon as the consignee has got the goods into his own possession and under his own care and management (*r*). If the goods are conveyed in public lighters, or in the boats or lighters of third parties, in accordance with the custom and usage of the port, the underwriters will continue liable until the goods are landed, unless such lighters or boats are in the possession and under the control of the consignee or owner of the goods, in which case the voyage will be just as much terminated as if they were his own lighters and boats, the goods being then actually delivered to him and in his possession (*s*). On an insurance of goods on a voyage

(*m*) *Minett* v. *Anderson*, Peake, 277.
(*n*) *Waples* v. *Eames*, 2 Str. 1243; *Horneyer* v. *Lushington*, 15 East, 46.
(*o*) *Lockyer* v. *Offley*, 1 T. R. 252.
(*p*) *Anon.*, Skinner, 243.
(*q*) *Stewart* v. *Bell*, 5 B. & Ald. 238.
(*r*) *Sparrow* v. *Caruthers*, 2 Str. 1236.
(*s*) *Hurry* v. *R. Ex. Ass. Co.*, 2 B. & P. 430; *Strong* v. *Natally*, 1 B. & P. N. R. 16.

policy, until the same are safely landed at the port of discharge, "including all risks to and from the ship," there is no implied warranty that the lighter used at the end of the voyage to convey the goods from the ship to the shore shall be seaworthy for that purpose (t). If a vessel is disabled and obliged to put into port before the voyage is completed, and is not worth repairing, and is consequently abandoned, and the master tranships the goods, and after such transhipment the goods are lost, the underwriters will be liable upon the policy (u).

Insurance on profits.—When profits expected to be realised from the carriage of merchandise are insured from the ordinary perils of the sea, and the ship is lost by a peril insured against, but the merchandise is brought safe to the port of destination by another vessel, there is no loss of profit within the meaning of the policy, and the underwriters are not responsible (x).

Freight policies.—The freight to be earned by the vessel on the performance of the voyage may be insured as well as the vessel itself, and the cargo laden on board. "The object of the contract is to protect the insured from being deprived by any of the perils insured against of the profit he would otherwise earn from the carriage of the goods. It is incumbent, therefore, on the insured to prove that, unless some of the perils insured against had intervened, some freight would have been earned, and evidence must be given, either that goods were put on board from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by perils insured against, would have been entitled to demand freight" (y). Prepaid freight cannot be recovered back (z). When an express contract of affreightment, under which the shipowner is entitled to the freight insured, can be proved, the risk on the policy will commence from the time that the shipowner has put himself into a condition to earn the freight, by making the vessel ready for sea and placing her at the disposal of the charterer, whether any goods have or have not been actually shipped on board under the contract (a). Thus, if a vessel is chartered for a voyage from A. to B., the interest in the freight commences on the vessel's sailing for A., either in ballast or with a small quantity only of goods for B., so long as she is starting solely with a view to the chartered

(t) *Lane* v. *Nixon*, L. R. 1 C. P. 412; 35 L. J. C. P. 243.

(u) *Plantamour* v. *Staples*, 3 Doug. 1; 1 T. R. 611, n.; *Shipton* v. *Thornton*, 9 Ad. & E. 337.

(x) *Chope* v. *Reynolds*, 5 C. B. N. S. 651; 28 L. J. C. P. 194.

(y) Ld. Ellenborough, *Forbes* v. *Aspinall*, 13 East, 327; *Patrick* v. *Eames*, 3 Campb. 441.

(z) *Allison* v. *Bristol Ins. Co.*, 1 Ap. Cas. 209.

(a) *Thompson* v. *Taylor*, 6 T. R. 478; *Truscott* v. *Christie*, 2 B. & B. 320; *Devaux* v. *I'Anson*, 7 Sc. 507; 5 Bing. N. C. 519.

freight (*b*). But, if no express contract of affreightment can be proved, the risk will not attach on the policy until goods have been actually shipped on board under circumstances giving the shipowner a right to freight (*c*).

When the insurance is on the freight to be earned on the outward and homeward voyage, and there is an express contract of charter-party for the outward and homeward voyage, the liability of the insurer will continue all through the outward and homeward voyage, whether any of the homeward cargo had or had not been taken on board at the time of the loss (*d*); but, if the insurance is on freight to be earned out and home, and the insured has only made a contract of affreightment for the outward voyage, the liability of the insurer, as respects the homeward voyage, will not commence until an express contract of affreightment for the homeward voyage has been entered into, or until a return cargo or return merchandise has been shipped on board, giving the shipowner a right to homeward freight (*e*). Freight may be insured for a portion of the voyage as well as a cargo of goods; and, if an insurance on freight is effected on a voyage from A. to B., the risk is not varied, and the underwriters are not discharged, because the vessel is in reality sailing from A. to C., touching at B., and the assured has neglected to disclose that fact to the underwriters (*f*). But, if the voyage is altogether a different voyage from the one insured, as, for instance, if the insurance is on the freight to be earned under a contract of affreightment for a particular voyage, and the voyage is subsequently altered, the underwriter will be discharged (*g*). As regards the meaning of the term freight, it has been held that, if the master, in order to make up a full cargo, buys merchandise on behalf of the shipowner and brings it home, the fair value of the conveyance of such goods may be included under the term freight in the policy (*h*). But, although "freight" includes the interest of the owner in the carriage of his own goods, yet in an ordinary policy it does not extend to passage money (*i*).

Loss of freight.—To recover for loss of freight, a total loss by perils of the sea must be proved. If the master has the means of repairing a vessel which has sustained sea damage, and of shipping and bringing home the cargo, and neglects to avail himself of the

(*b*) *Barber* v. *Fleming*, L. R. 5 Q. B. 59, 63; *Foley* v. *The United Fire Ass. Co.*, L. R. 5 C. P. 155; *Mercantile Steam Co.* v. *Tyser*, 7 Q. B. D. 73.

(*c*) *Tonge* v. *Watts*, 2 Str. 1251.

(*d*) *Davidson* v. *Willasey*, 1 M. & S. 313; *Atty* v. *Lindo*, 1 B. & P. N. R. 236.

(*e*) *Williamson* v. *Innes*, 8 Bing. 81, n.

(*f*) *Taylor* v. *Wilson*, 15 East. 330.

(*g*) *Sellar* v. *M'Vicar*, 1 B. & P. N. R. 25.

(*h*) *Flint* v. *Flemyng*, 1 B. & Ad. 45; *Devaux* v. *I'Anson*, 7 Sc. 507; 5 Bing. N. C. 519.

(*i*) *Denoon or Dinoon* v. *Home & Colonial Assur. Co.*, L. R. 7 C. P. 341; 41 L. J. C. P. 162.

opportunities within his reach, the insurer cannot recover for loss of freight (*k*). Where the insurance was on freight, and the ship was injured by perils of the sea, and obliged to put into port and land the cargo to re-fit, and part of the cargo was so wetted by sea-water that it could not be re-laden on board without imminent danger of ignition, unless it went through a process which would have detained the vessel six weeks, at an expense equal to the freight, and the master sold the goods, and, finding he could not obtain others, sailed on his voyage, it was held that the underwriters were not liable to make good the loss of the freight on these goods (*l*). Where the plaintiff having entered into a charter-party by which the ship was to proceed to Newport and there load a cargo, insured the chartered freight, and the ship on the way to Newport was delayed by the perils insured against for so long a time that the freighter refused and was justified in refusing to load a cargo, it was held that there was a total loss of the freight (*m*).

Insurance on passage money.—When the insurance has been effected on passage money, and the ship is disabled and obliged to put into port for repairs, and great expenses are incurred in maintaining the passengers, there is no loss for which the underwriters are liable, if the vessel ultimately completes the voyage and earns the money (*n*).

Deviation from the voyage insured.—Every policy of insurance is effected upon the implied understanding that the vessel will proceed straightway and without unnecessary delay to her place of destination. If, therefore, she voluntarily deviates from her course to put into port, and is afterwards lost, the underwriters will be discharged (*o*), unless it be shown that she went there under the pressure of necessity (*p*), or for necessary repairs or purposes essential to the safe prosecution of the voyage (*q*), or to avoid pirates, or icebergs, or other dangers of navigation (*r*), or that she went out of her way for the purpose of succouring a ship in distress (*s*), or of procuring convoy (*t*), or had liberty by the charter-party to make deviations or to call at different ports for trading purposes. A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property (*u*).

(*k*) *Philpot* v. *Swan*, 5 Law T. R. N. S. 183.

(*l*) *Mordy* v. *Jones*, 4 B. & C. 400.

(*m*) *Jackson* v. *Union Insurance Co.*, L. R. 8 C. P. 572; 10 C. P. 125; see *Inman Steam Co.* v. *Bischoff*, 6 Q. B. D. 648.

(*n*) *Willis* v. *Cooke*, 5 Ell. & Bl. 647; 25 L. J. Q. B. 16; as to insurances against the charges and liabilities which may be incurred under the Passengers Act, 1852, see *Gibson* v. *Bradford*, 4 Ell. & Bl. 586; 24 L. J. Q. B. 159.

(*o*) *Elliot* v. *Wilson*, 4 Bro. P. C. 470.

(*p*) *Scott* v. *Thompson*, 1 B. & P. N. R. 181.

(*q*) *Weir* v. *Aberdeen*, 2 B. & Ald. 320; *Delaney* v. *Stoddart*, 1 T. R. 22.

(*r*) *The Teutonia*, L. R. 4 P. C. 171, 179.

(*s*) Arnold, Ins. 405; *The Jane*, 2 Hag. Adm. 345.

(*t*) *Bond* v. *Nutt*, 2 Cowp. 601.

(*u*) *Scaramanga* v. *Stamp*, 5 C. P. D. 295, C. A.

It is not necessary to a deviation or change of risk whereby the underwriters are discharged that the degree or period of the risk should be thereby increased (*x*). If the voyage insured has been actually abandoned, and it has been determined to alter the ship's destination, the underwriters will be discharged; but a mere meditated change of destination, not carried into effect by an actual abandonment of the voyage, will not have that effect (*y*). If a ship insured for one voyage sails upon another, and the same track for part of the distance leads towards both places of destination, and the vessel is taken before she arrives at the dividing point for the two voyages, the underwriters are nevertheless discharged, because there never was any inception at all of the particular voyage insured (*z*). But, if there is an actual inception of the voyage insured, and there exists only an intention to deviate, and no deviation had in fact taken place at the time of the loss, the underwriters will remain liable (*a*). And, if a loss occurs before any actual deviation has taken place, and the vessel afterwards deviates, the loss will fall upon the underwriters (*b*). But a vessel, or goods, or freight, may be insured for part of a voyage as well as the whole distance; and, if a vessel is chartered from A. to C., touching at B., and the vessel is insured from A. to B., there is no pretence for saying that the underwriters are discharged merely because the vessel is going on to an ulterior place of destination which is not disclosed at the time they accept the risk (*c*). And, if a ship is compelled by adverse circumstances in the course of her voyage to enter a port to victual, or repair, or re-fit, or if she is compelled to cast anchor, to pay toll, or to await a fair wind, she may avail herself of the opportunity to take in some additional cargo, provided no additional delay is thereby created (*d*). But, if the circumstances rendering it necessary to go into port or to cast anchor have been designedly brought about by the insured, this is a fraud upon the underwriters which discharges them from liability.

If a ship, with goods on board insured on a voyage to a foreign port, learns in the course of the voyage thither that an embargo has been laid on all ships of her nation at that port, but there is a prospect of the speedy removal of the embargo, and she accordingly goes into port as near as she can safely get to the port of destination, and there waits a short time for the removal of the

(*x*) Phillips on Insurance, 983; *Hartley* v. *Buggin*, 3 Dougl. 39; *Company of American Merchants* v. *British & Foreign Insurance Co.*, L. R. 8 Ex. 154.

(*y*) *Tasker* v. *Cunninghame*, 1 Bligh, 87; *Driscol* v. *Boril*, 1 B. & P. 313.

(*z*) *Way* v. *Modigliani*, 2 T. R. 32.

(*a*) *Foster* v. *Wilmer*, 2 Str. 1249; *Hesellon* v. *Allnutt*, 1 M. & S. 46.

(*b*) *Green* v. *Young*, 2 Ld. Raym. 840; 2 Salk. 444; *Hare* v. *Travis*, 7 B. & C. 16.

(*c*) *Taylor* v. *Wilson*, 15 East, 330.

(*d*) *Laroche* v. *Oswin*, 12 East, 131.

embargo with the intention of continuing the voyage, she will be protected by the policy in so doing. But, if she abandons the voyage and sails back to her port of outfit and is lost on the homeward voyage (*e*), or if, through reasonable fear of an embargo, or of the ports of destination becoming hostile ports, she sails to a port not named in the policy, and so embarks on a new voyage or adventure, the underwriters will be discharged, as the new risk then run is not the risk they insured against (*f*). If the vessel goes out of her course in order to avoid a peril not insured against and is lost, the underwriters will be discharged, but not if the peril sought to be avoided was covered by the policy. Thus, where loss from capture in a particular port was excepted from the policy, and the vessel ran out to sea and out of her course to avoid capture, and sailed to an adjoining port, and was lost from peril of the sea, it was held that the underwriters were not liable (*g*); but, where the vessel was insured against capture in port, and put to sea, and deviated from her course to avoid capture, it was held that they were liable (*h*).

Unreasonable delay at any place at which the vessel is authorised to touch is equivalent to a deviation; for it is an implied term of every contract of insurance that the voyage shall be performed without delay, unless liberty is given to the vessel to halt in her course; and, consequently, if there are necessary stoppages, the adventure becomes a different adventure from that which the underwriters agreed to insure (*i*). But, if the delay is necessary and reasonable, the risk on the policy will continue, and the underwriters remain chargeable (*k*).

Insurances on voyages to several ports and places.—When the insurance is on a voyage to several ports and places named in successive order, and the final port of discharge is fixed, the general rule is that the vessel must go to them in the order in which they are named in the policy, unless a different intention is manifested by the policy, or unless a usage to the contrary be established; but, if they are not named in successive order, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, without reference to the shortest geographical distance; and, if the ship's final port of discharge is not fixed, but the vessel is at liberty to select any port that may be found most suitable as a discharging port, she may take any ports she is authorised to touch at in any order she may think fit (*l*).

(*e*) *Blackenhagen* v. *Lond. Ass.* 1 Campb. 454.
(*f*) *Oliverson* v. *Brightman*, 8 Q. B. 781.
(*g*) *O'Reilly* v. *R. Ex. Ass. Co.*, 4 Campb. 246.
(*h*) *O'Reilly* v. *Gonne*, 4 Campb. 249.
(*i*) *Mount* v. *Larkins*, 8 Bing. 122.
(*k*) *Phillipps* v. *Irving*, 8 Sc. N. R. 8.
(*l*) *Andrews* v. *Mellish*, 5 Taunt. 502.

Where a ship and freight were insured "at and from Pernambuco or any other ports in the Brazils to London, beginning the adventure upon the said ship," &c., on the termination of her cruise and preparing for her voyage to London, and the cruise terminated and the vessel put into Pernambuco to obtain a cargo, but, finding none, sailed to San Salvador, a Brazilian port, 500 miles distant, and was lost on the way, it was held that the sailing from Pernambuco to St. Salvador was not a deviation, and that the policy was intended to secure the vessel from loss whilst she was procuring her cargo in some one or other of the Brazilian ports (*m*). So, where a policy was at and from Martinique and all or any of the West India Islands to London, and the vessel sailed from Martinique to St. Domingo to take in her cargo, which was far away from the direct course from Martinique to London, it was held that there was no deviation (*n*).

Licences to touch at different ports and places.—When, by the express terms of the policy, the vessel is to be "at liberty, in the outward or homeward bound voyage, to proceed, sail to, touch, and stay at, any ports or places whatsoever, without the same being deemed a deviation," the liberty extends only to such places as are in the usual course of the voyage, and customarily resorted to by traders making such voyages (*o*). A licence of this kind will not enable the captain to alter the regular course of the voyage, or touch at any place or port for purposes unconnected with the main adventure (*p*), or to stay an unreasonable time at places he is authorised to touch at (*q*); and, if he sails with convoy, it will not authorise him voluntarily to stay at places, when by so doing he will part company with the convoy (*r*). Whenever a vessel is on a seeking voyage, and is to look about for some safe port of discharge, and has consequently "liberty to touch at any port or ports" in a particular sea "for orders, or any other purpose," the insured will be entitled to make every call, stay, or delay which may be necessary for safety and for the due accomplishment of the object of the voyage (*s*). Where the name of the place to which the vessel is to sail comprehends a particular town and harbour, and also an extensive district of coast, the policy will cover and protect only a voyage from the particular town and harbour, unless it appears that by maritime custom and usage the whole line of coast is considered, for insurance purposes, to be included

(*m*) *Lambert* v. *Liddard*, 5 Taunt. 480.

(*n*) *Bragg* v. *Anderson*, 4 Taunt. 229; *Ashley* v. *Pratt*, 16 M. & W. 471; *Pratt* v. *Ashley*, 1 Exch. 257; 17 L. J. Ex. 135.

(*o*) *Lavabre* v. *Wilson*, 1 Doug. 284.

(*p*) *Bottomley* v. *Bovill*, 5 B. & C. 218.

(*q*) *Urquhart* v. *Barnard*, 1 Taunt. 450.

(*r*) *Williams* v. *Shee*, 3 Campb. 469.

(*s*) *Hunter* v. *Leathley*, 10 B. & C. 873; 7 Bing. 517.

under the name used in the policy (*t*). An open roadstead is a port within the meaning of the term "port" in a policy, if it is used as such by seafaring persons, and is resorted to by shipping for the discharge and loading of cargoes and merchandise (*u*).

Sometimes vessels are expressly insured for a general voyage to any ports or places whatsoever, in port and at sea, in all places, at all times, and in all services, to the intent that the risk may be covered by the policy, whatever may be the employment of the vessel, and however long the duration of the voyage.

Total loss and abandonment—Notice of abandonment.—If a ship insured for a particular voyage grounds on a sandbank and cannot be got off, the loss is a total loss, although the ship still exists *in specie.* If she is disabled by stress of weather, and is so strained and shaken as not to be worth repairing, the loss is a total loss, although she still exists as a ship in the dockyard. And, when a vessel has been wrecked, the cargo is totally lost if no part of it can be recovered for the benefit of the assured. If a cargo is so much injured as to be unfit for conveyance to the port of destination, and has consequently been landed at an intermediate port to prevent its entire destruction, the loss is in contemplation of law, as between the underwriter and insured, a total loss, and the latter is entitled to recover the full amount of the insurance (*x*). But in these cases, when the subject-matter of the insurance is not totally destroyed, the insured must, in order to recover the full amount of the insurance as for a total loss, ABANDON what remains, *i. e.*, he must make a cession of all his proprietary rights thereto to the underwriters, and give them notice of abandonment. The notice of abandonment is required in all cases to give the insurers the means of inquiry and of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure all the benefit that can be derived from the wreck. It must be given "within a reasonable time after the insured receives intelligence of the accident, that the underwriter may be entitled to the benefit of what may still be of value" (*y*). Where the insured receives information that the subject of insurance is in *imminent* danger of becoming a total loss he must immediately give notice of abandonment, and it is immaterial that

(*t*) *Constable* v. *Noble*, 2 Taunt. 403.

(*u*) *Sea Ins. Co.* v. *Gavin*, 4 Bligh, N. S. 578; *Brown* v. *Tayleur*, 4 Ad. & E. 248; *Cockey* v. *Atkinson*, 2 B. & A. 460; *Harrower* v. *Hutchinson*, L. R. 5 Q. B. 584.

(*x*) *Ionides* v. *The Universal Ins. Co.*, 14 C. B. N. S. 292; 32 L. J. C. P. 176.

(*y*) *Mitchell* v. *Edie*, 1 T. R. 613; *Knight* v. *Faith*, 15 Q. B. 659; *Gernon* v. *Royal Exchange*, &c., 6 Taunt. 383; *King* v. *Walker*, 33 L. J. Ex. 325; 3 H. & C. 209; *Stringer* v. *The English Ins. Co.*, L. R. 4 Q. B. 676; aff. 5 Q. B. 599.

the subject of insurance is afterwards justifiably sold (z). The abandonment must be an unconditional and unreserved abandonment of the whole of the subject-matter of the insurance to the insurers or underwriters, unless the latter think proper to accept of a conditional abandonment. When the subject-matter of the insurance totally perishes, no notice of abandonment is necessary; for there is nothing to abandon (a). And, when it is so far annihilated that it no longer exists *in specie*, a formal abandonment of the comparatively valueless remnants of what was once a ship or a cargo is not necessary to enable the assured to recover as for a total loss (b), although, if these remnants are worth anything at all, or have been sold, the underwriters will be entitled to them, or to the value of them, or to the price they have fetched; for it is contrary to the principle of every contract of indemnity to permit the insured to recover more than the amount of the loss sustained (c). If the insurance is on freight, and the voyage is lost by a peril insured against, so that the freight cannot be earned by the insured, the loss is a total loss, and there is no need of an abandonment of freight; "for there is nothing to abandon" (d). If the adventure is brought to an end by a peril insured against, and the things are taken out of the power of the insured, as, for instance, if they are totally lost to him by reason of capture or seizure in a foreign port, or by political laws working detention and sale by a court, or by circumstances of distress and danger creating a mercantile necessity for a sale, there is no necessity for any notice of abandonment (e). And, where the sale was not under a condemnation of any court, but took place because the insured declined to give security to prevent the sale, it was held that such sale was a total loss occasioned by the seizure, the giving of the security under the circumstances not being the course which a prudent uninsured owner would have adopted (*f*). But it is otherwise where the sale is not a necessary or natural consequence of any of the perils insured against (*g*). A constructive total loss is a total loss within the meaning of a policy against "total loss only" (*h*).

By whom notice of abandonment may be given.—The party

(z) *Kaltenbach* v. *Mackenzie*, 3 C. P. D. 467, C. A.

(a) *Rankin* v. *Potter*, L. R. 6 H. L. Cas. 83; 42 L. J. C. P. 169.

(b) *Cambridge* v. *Anderton*, 2 B. & C. 691; *Allen* v. *Sugrue*, 8 B. & C. 561.

(c) *Roux* v. *Salvador*, 4 Sc. 34.

(d) *Idle* v. *Roy. Ex. Ass. Co.*, 8 Taunt. 755; 3 Moore, 142; *Mount* v. *Harrison*, 4 Bing. 388; 1 M. & P. 14; *Rankin* v. *Potter*, *ante*, p. 711.

(e) *Farnworth* v. *Hyde*, 34 L. J. C. P. 207; 18 C. B. N. S. 835; *Mullett* v. *Shedden*, 13 East. 304; *Mellish* v. *Andrews*, 15 *ib.* 16.

(*f*) *Stringer* v. *The English, &c., Insurance Co.*, L. R. 4 Q. B. 676, 690; 5 Q. B. 599.

(*g*) *De Mattos* v. *Saunders*, L. R. 7 C. P. 570.

(*h*) *Adams* v. *Mackenzie*, 13 C. B. N. S. 442; 32 L. J. C. P. 92.

giving notice of abandonment must be the party in whom the property in the ship is at the time vested. Where, therefore, a policy of insurance has been deposited as security for an advance of money, the pledgee of the policy has no implied authority to give notice of abandonment; but it is otherwise with a person who has a mortgage on the ship (*i*).

Form of notice of abandonment.—The word "abandon" need not be used; any words showing an intention to give up the property insured upon the ground of its having been totally lost will be sufficient (*k*).

Effect of notice of abandonment.—The effect of a notice of abandonment, therefore, is to put the insured into a condition to claim from the underwriters as for a total loss, provided the facts as they are subsequently established warrant an abandonment. If they do not warrant an abandonment, or the insured neglects to give prompt notice of abandonment, he must proceed against the underwriters for the loss he has actually sustained. The insured then makes the best of what he can save, and resorts to the underwriter for the actual loss, after deducting the value of the remnants. On the other hand, when there is a constructive total loss and an abandonment, the risk of saving what remains to be saved is thrown upon the underwriter. After the abandonment the insurer stands in the place of the insured, and is clothed with the ownership of the property saved, and is entitled to all the profits and advantages that may accrue therefrom; and, if the insured recovers and retains possession of any portion of the property, the underwriters may maintain an action against him for the recovery of the value of it (*l*). The abandonment is retrospective in its operation, so that the title of the abandonees relates back to the time of the loss (*m*).

Insurance on freight—Where a ship and the freight to be earned on the voyage were insured by separate sets of underwriters, and the ship was captured, and the ship and freight were abandoned to the respective underwriters, who each paid as for a total loss, and after that the ship was recaptured, and then performed her voyage and earned freight, it was held that the underwriters on the *ship* were entitled to the freight so earned, to the exclusion of the underwriters on the freight; "for freight follows as an incident the property in the ship" (*n*). The insured ship is by the abandonment vested in the underwriters from the time of the loss; and, as their ship earns the freight, they are entitled to it

(*i*) *Jardine* v. *Leathley*, 3 B. & S 700; 32 L. J. Q B. 132.

(*k*) *Currie* v. *The Bombay Native Ins. Co*, L. R. 3 P. C. 72.

(*l*) *Leatham* v. *Terry*, 3 B & P. 479.

(*m*) *Cammell* v *Sewell*, 3 H. & N. 644 27 L J. Lx. 447.

(*n*) *Davidson* v. *Case*, 5 Moo. 116.

as purchasers of the ship (*o*); but if, at the time of the casualty, there is no freight pending, as, for instance, if the shipowner is carrying his own goods, the abandonment can give no right to freight (*p*). Where, after an embargo on a ship, the ship and freight were adandoned to the respective underwriters, and the embargo was taken off and the ship completed her voyage and earned freight, it was held that the shipowners had no right to the freight earned after the abandonment of the ship, and that the loss of freight was not demandable from the underwriters on freight, as it was not lost by means of the perils insured against, but by reason of the abandonment of the ship, which was the act of the insured themselves (*q*). A total loss of the ship, therefore, does not necessarily involve a total loss of the freight. The ship may get to port a mere wreck, and deliver her cargo and earn freight, and the shipowner may elect to abandon and proceed for a total loss; but, if he does so, the underwriters of the ship will be entitled to the freight, and the insured will have no claim to any indemnity from the underwriters on freight for the loss of freight. Thus, where a ship and freight were separately insured by separate policies, and the ship came into port greatly damaged, and after survey was found not worth repairing, and was finally abandoned, but the cargo was safely landed, and the freight was earned and received by the shipowners, and was then handed over by them to the underwriters, as incident to the ship, which being done, the shipowners proceeded against the underwriters on freight for indemnity for loss of freight, it was held that they had no claim whatever in respect thereof, as the freight had been earned and actually received by the shipowners, and might have been retained by them for their own use, but for their subsequent voluntary election to abandon to the underwriters on the ship, and to constitute such underwriters the owners of the damaged ship and the freight earned by it (*r*).

But in all these cases where the underwriters are entitled to the freight after abandonment, the freight has been earned by the insured ship. If another ship finishes the voyage, the underwriters are not entitled to the freight, unless the substituted vessel is their vessel, or has been hired for their benefit by their agents (*s*). And, if the goods in the ship are the property of the owner of the ship, and he is carrying them on his own account, the abandonees of the ship have no claim to freight (*t*).

(*o*) *Hickie* v. *Rodocanachi*, 4 H. & N. 466; 28 L. J. Ex. 273.

(*p*) *Miller* v. *Woodfall*, 8 Ell. & Bl. 504; 27 L. J. Q. B. 120.

(*q*) *M'Carthy* v. *Abel*, 5 East, 388.

(*r*) *Scot. Marine Insur. Co.* v. *Turner*, 17 Jur. 631; 4 H. L. C. 312, n.; *Benson* v. *Chapman*, 8 C. B. 964.

(*s*) *Hickie* v. *Rodocanachi*, 4 H. & N. 467; 28 L. J. Ex. 273.

(*t*) *Miller* v. *Woodfall*, 8 Ell. & Bl. 493; 27 L. J. Q. B. 120.

The shipowner and charterer may agree that a portion of the freight shall be prepaid, in which case, as it cannot be recovered back, that portion is not a risk, and is not insurable; but the remaining portion may be insured, and if the ship is wrecked, and only such an amount of cargo is saved as corresponds with the prepaid freight, the insured may recover as for a total loss (*u*).

When the insured may abandon—Total losses.—The general rule is that the insured may abandon in every case and claim for a total loss, when, by the occurrence of any of the misfortunes or perils insured against, the subject-matter of the insurance is so injured or deteriorated as to render any further dealing with it in the mode contemplated at the time the policy was effected worthless. If a vessel insured for a voyage is so much injured by perils of the sea that the cost of the repairs will be more than the vessel is worth when repaired, the insured may abandon and claim for a total loss (*y*). But not if the vessel is worth repairing, and can be repaired and re-fitted for sea at an expense less than her value when repaired (*z*). So, if a stranded vessel can by any means within reach of the captain, which he could reasonably use, be recovered and saved, the vessel cannot be abandoned by the insured; and, if the captain, to avoid the trouble of recovering the vessel, sells her as she lies, the sale will not entitle the insured to treat the loss as a total loss, and to abandon to the underwriters (*a*). When a ship and cargo are so submerged that both must be got up together, the expenditure incurred in raising them is for the common preservation of both, and the cargo must contribute thereto as well as the ship, and the amount to be contributed by the cargo must be taken into account for the purpose of ascertaining whether or not the ship is a total loss (*b*). The loss of the voyage has nothing to do with the loss of the ship; and the shipowner who has insured his ship cannot abandon the ship, merely because the voyage cannot be completed and the freight earned (*c*). If the policy is on freight, and the ship is detained by an embargo, the loss is *primâ facie* total; but, if the embargo be taken off and

(*u*) *Allison* v. *Bristol Marine Ins. Co.*, 1 Ap. Cas. 209.

(*y*) *Young* v. *Turing*, 2 Sc. N. R. 762; *Irving* v. *Manning*, 2 C. B. 784; 1 H. L. C. 287; *Phillips* v. *Nairne*, 4 C. B. 358; *De Cuadra* v. *Swann*, 16 C. B. N. S. 772. In America, if the subject-matter of insurance sustains damage to an extent beyond 50 per cent., the assured may abandon and recover as for a total loss unless there is something expressed in the policy to exclude this implication, and this right depends on the state of things when the notice of abandonment was given, and is not altered by any subsequent change in the state of things; *Per* Blackburn, J., *Kemp* v. *Halliday*, 7 B. & S. 723; 34 L. J. Q. B. 233.

(*z*) *Moss* v. *Smith*, 9 C. B. 103; 19 L. J. C. P. 225.

(*a*) *Knight* v. *Faith*, 15 Q. B. 657; 19 L. J. Q. B. 509; *Gardner* v. *Salvador*, 1 M. & Rob. 116; *Doyle* v. *Dallas*, *ib.* 48; *Tanner* v. *Bennett*, R. & M. 182.

(*b*) *Kemp* v. *Halliday*, 34 L. J. Q. B. 233; 35 L. J. Q. B. 156; 6 B. & S. 723; L. R. 1 Q. B. 520.

(*c*) *Pole* v. *Fitzgerald*, Willes, 647.

she then earns freight, the loss is partial only (*d*). If the vessel is driven by stress of weather into port to repair and re-fit, and the master hypothecates the ship, freight, and cargo for the payment of these repairs, and the amount exceeds the value of the ship and freight, the loss is a total loss (*e*). Where goods are, in consequence of the perils insured against, lying at a place different from their destination, damaged, but in such a state that they can at some cost be put in a condition to be carried to their destination, the question to be determined is, whether it is practically possible to carry them on, that is, whether to do so will cost more than they are worth, and in determining this there must be taken into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but there must not be taken into account the fact that, if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not (*f*). Where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, there must not be taken into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened (*g*).

The mere suspension or retardation of the voyage in the case of an insurance on goods and merchandise is no ground of abandonment (*h*). If, however, the voyage is not worth pursuing by reason of the delay, or if salvage services have been rendered, and the insured has no means of paying them, he may persist in the abandonment, and claim as for a total loss; but, if it appears that he could probably have raised money to liberate the vessel, and that he made no exertion to do it, he cannot treat the loss as a total loss; for he is bound in every case to exert himself to the uttermost of his power to prevent the loss from being a total loss (*i*). If the ship, being disabled at sea, is deserted by her crew, and is subsequently detained for salvage, and the cargo, being of a perishable nature, is so much damaged as not to be worth sending to the place of destination after satisfaction of the claim of the

(*d*) *Everth* v. *Smith*, 2 M. & S. 278.

(*e*) *Benson* v. *Chapman*, 7 Sc. N. R. 625; 2 H. L. C. 720.

(*f*) *Farnworth* v. *Hyde*, L. R. 2 C. P. 204.

(*g*) *Rosetti* v. *Gurney*, 11 C. B. 176; 20 L. J. C. P. 257; *Farnworth* v. *Hyde*, *supra*.

(*h*) *Anderson* v. *Wallis*, 2 M. & S. 240.

(*i*) *Thornely* v. *Hebson*, 2 B. & Ald. 518.

salvors, the loss is a total loss (*k*). If the cargo is taken out of the possession and control of the insured by the barratrous conduct of the master or crew, and some portion of it is afterwards recovered, the insured may nevertheless abandon and treat the loss as a total loss (*l*). If the cargo can be transhipped and forwarded to the port of destination without any material deterioration or delay, the insured has no right to abandon it and claim for a total loss; but it is his duty to go on with the adventure and turn it to the best advantage, and to proceed against the underwriter for a partial loss, being the amount of the actual damage sustained by the peril insured against (*m*).

Capture and re-capture and abandonment—Embargo—Spes recuperandi.—Capture by an enemy or a pirate, or an arrest of princes, or an embargo, entitles the insured to abandon and claim for a total loss, unless the embargo has been taken off, or the vessel has been re-captured and restored to the owners, or they have the immediate means of recovering the vessel (*n*), and may reasonably be expected to take possession of it (*o*). On re-capture by an English vessel the shipowner has a right to the restitution of his ship on payment of salvage; and, if the insurance is on the ship, and the ship is re-captured and placed within the power of the insured, the loss, which was before a total loss, becomes then only a partial loss (*p*), unless the vessel is in a damaged and unseaworthy state, or the salvage and costs and expenses attendant upon the re-capture are likely to be more than the vessel is worth. and the voyage cannot be advantageously prosecuted. If the vessel be captured and re-captured, and the insured neither has the vessel restored to him nor any means of obtaining possession of it, or if the consequences of the capture are such as to occasion a total obstruction of the voyage, "or render it not worth pursuing, if the salvage be high, if further expense be necessary, and the insurer will not, at all events, undertake to pay that expense, the loss continues a total loss, and the insured may abandon, notwithstanding the re-capture" (*q*). Where a ship was captured and re-captured, and sold in a distant country to pay the salvage, and the residue of the proceeds remained in the court of Admiralty there, it was held that the insured might abandon and recover for a total

(*k*) *Parry* v. *Aberdein*, 9 B & C 416.

(*l*) *Dixon* v. *Reid*, 5 B. & Ald. 597.

(*m*) *Hunt* v. *R Ex. Ass Co* 5 M. & S. 53; *Fulkner* v. *Ritchie*, 2 *ib*. 293.

(*n*) *Goss* v. *Withers*, 2 Burr. 692; *Kleinwort* v *Shepard*, 28 L J. Q B 147; *Cologan* v. *Lond. Ass Co*, 5 M. & S. 455; *Wilson* v. *Forster*, 6 Taunt 25.

(*o*) *Lozano* v. *Janson*, 28 L. J. Q. B. 343; 2 El. & El. 160.

(*p*) *Hamilton* v. *Mendez*, 2 Burr 1198; 1 W. Bl 276, *Brotherston* v *Barber*, 5 M. & S 418, *Bainbridge* v. *Neilson*, 10 East, 329.

(*q*) *Dean* v *Hornby*, 3 Ell. & Bl. 190; 23 L. J Q. B. 129, *Milles* v. *Fletcher*, 1 Doug. 232; *M'Iver* v. *Henderson*, 4 M. & S. 584.

loss (*r*). If the insurance is on goods and merchandise, laden on board the vessel, and the vessel is captured, and notice of abandonment is given by the assured, and after that the vessel is re-captured with the goods and merchandise on board uninjured, the insured cannot persist in his abandonment and claim for a total loss (*s*). And, if the vessel is unable to complete her voyage by reason of an embargo suddenly laid on English vessels at the port of destination, or by reason of the hostile interference of an enemy, the insured cannot, on that account, abandon the goods and claim for a total loss, unless the goods have been deteriorated and injured, and rendered unfit for mercantile speculation and adventure (*t*).

Unreasonable abandonment.—"The privilege of abandoning," it has been justly observed, "is liable to great abuse. Where, as in the case of capture, the thing insured is completely gone out of the power of the insured, it is just and proper that he should recover at once as for a total loss, and leave the *spes recuperandi* to the insurer. But it seems unreasonable that the owner of a ship which is stranded (the captain and crew, his servants, being on the spot and in possession of the ship and cargo), should be at liberty to abandon these to a number of underwriters, who sometimes find it difficult to act in concert, and who have, perhaps, no means of disposing of the property thus thrown upon their hands but to the greatest disadvantage" (*u*). "I am not disposed," observes Lord Ellenborough, "to enlarge the grounds of abandonment against underwriters, a privilege which every one knows has been much abused. In almost every case of a valued policy it is the interest of the insured to abandon; and it therefore becomes the court to watch every such case, and in no instance to enlarge that, which in its nature is only an average, into a total loss" (*x*).

Partial loss—Exception of partial losses.—A partial loss is not paid for, if there is a total loss of the vessel from perils insured against during the period covered by the policy; because, when the underwriter pays the total loss, he actually discharges all partial losses occurring during the voyage, except such as fall within the suing and labouring clause, which are apart from the sum insured. He never stipulated to pay more than the total loss; and, if he were to pay for a partial loss, and also the whole value of the vessel, he would be paying more than he undertook to indemnify the insured against. If a partial loss is sustained, and then the whole subject-matter of the insurance is totally lost from a peril excepted from the policy, the underwriters will not be responsible for the

(*r*) *Pringle* v. *Hartley*, 3 Atk. 195.

(*s*) *Naylor* v. *Taylor*, 9 B. & C. 718.

(*t*) *Hadkinson* v. *Robinson*, 3 B. & P. 388; but see *Barker* v. *Blakes*, 9 East, 293.

(*u*) Marshall on INSURANCE, p. 565, 3rd ed.

(*x*) *Bainbridge* v *Neilson*, 10 East, 343.

partial loss, unless it has occasioned actual pecuniary loss to the insured (*y*). But if the total loss does not take place until after the expiration of the period covered by the policy, the underwriter will be responsible for the partial loss, and must pay the amount of the diminution in the value of the vessel occasioned by the partial loss, without reference to whether the vessel had been repaired or not before the total loss occurred (*z*). If a vessel loses a mast by a peril insured against, and is re-fitted, the loss is a partial loss; and, if the vessel then puts to sea, and is totally lost, the insured is entitled to be indemnified in respect of the partial loss, as well as the total loss; but, if, before the vessel is re-fitted, she is totally lost, the insured cannot then recover in respect of the partial loss (*a*). In case of a partial loss, and in the absence of other means of arriving at the loss, the insured is entitled to recover the cost of repairs up to the amount insured with the reduction of one-third new for old, even although this amount might be more than the amount payable for a total loss with benefit of salvage (*b*). A memorandum is frequently introduced at the foot of maritime policies, exempting the underwriters from all partial losses upon certain articles and descriptions of merchandise, and from all partial losses not amounting to 5*l.* per cent. upon other classes of merchandise, and from all partial losses upon ship and freight not amounting to 3*l.* per cent., unless the loss be a general average and contribution loss (*ante*, pp. 514, 518). In many policies the underwriters exempt themselves from all partial or average losses of every description, excepting general average losses, so that they are not responsible at all upon the policy unless there is a total loss, or unless there has been a general average contribution. When the policy is warranted "free from particular average," no damage short of the absolute destruction of the thing insured will amount to a total loss. An exemption of this kind opens a wide door to fraud, inasmuch as a direct premium is offered to the insured to turn every partial loss into a total loss, in order that it may be covered by the policy (*c*).

General and particular average—Policies warranted free from average.—The term "average" is used, in insurance contracts and trading adventures, to denote every kind of partial loss or damage happening either to the ship or the cargo, from any cause whatever. It has been truly observed, that ambiguities frequently arise from the indiscriminate use, in mercantile matters, of the word AVERAGE, which has no less than four different meanings

(*y*) *Livie* v. *Janson*, 12 East, 656.

(*z*) *Lidgett* v. *Secretan*, L. R. 6. C. P. 616.

(*a*) *Stewart* v. *Steele*, 5 Sc. N. R. 941.

(*b*) *Aitchison* v. *Lohre*, 4 Ap. Cas. 755, where repairs were actually done, *aliter* where not done, see *Pitman* v. *Universal Ins. Co.*, 9 Q. B. D. 192, C. A., diss. Brett, L. J.

(*c*) *Dyson* v. *Rowcroft*, 3 B. & P. 476.

amongst commercial men. In policies of insurance we constantly meet with the terms general average and particular average; the first signifies general average losses arising from the general contribution made by all parties interested in a ship or cargo towards a loss sustained by some for the benefit of all, under the circumstances previously described (*ante*, pp. 514, 515); and the second, the particular or partial loss sustained by the insured, not connected with the loss of any other party, and not occasioned by a general average contribution. For example, if a small portion of corn or flax receives damage from sea-water to the extent of 45*l.*, and the entire value of the whole cargo is 1,000*l.*, this is an average loss of 4½ per cent. upon the whole, and is called "average" in mercantile phraseology; so that, if the cargo is warranted "free from average under 5*l.* per cent.," the underwriters will be exempted from all responsibility in respect of this partial or average loss (*d*). If a cargo of corn insured "free from average" receives damage from sea-water, and the vessel puts into port for the purpose of drying the corn and preventing its total destruction, and the corn is so much damaged that if brought home it could not have been sold for an amount exceeding the expenses of unshipping, drying it, and bringing it home, the loss is total; but, if the value of the corn in England would exceed these expenses, the loss is an average loss within the warranty exempting the underwriters from liability. An insurance on goods warranted free of average, unless general, is equivalent to an insurance against their total loss only. As a general rule, where the whole or any part of the cargo is capable of being sent in a marketable state to the port of destination without laying out more money than it is worth, the master cannot sell, nor can the insured recover for a total loss (*e*). But the effect of a warranty against particular average is merely to limit the operation of the insurance to a total loss of the subject-matter, and is not to prevent a recovery under the suing and labouring clause of extraordinary expense which may be incurred in preserving it (*f*).

Insurance on separate bales or packages—Average and total losses.—If the merchandise insured is packed in separate bales, hogsheads, or packages, and the insurance is effected on each bale, hogshead, &c., separately, and some bales or hogsheads are totally lost, and others saved, the loss of each separate bale, hogshead, &c.,

(*d*) *Wilson* v. *Smith*, 3 Burr. 1550; *M'Andrews* v. *Vaughan*, 1 Park Ins. 252; *Mason* v. *Skurry*, *ib.* 253; *Oppenheim* v. *Fry*, 33 L. J. Q. B. 267; 5 B. & S. 348.

(*e*) *Reimer* v. *Ringrose*, 6 Exch. 267; 20 L. J. Ex. 175; *Rosetto* v. *Gurney*, 11 C. B. 187; 20 L. J. C. P. 257; *Gt. Ind. Penins. Rail. Co.* v. *Saunders*, 31 L. J. Q. B. 206; 1 B. & S. 41; 2 B. & S. 266; *Booth* v. *Gair*, 15 C. B. N. S. 291; 33 L. J. C. P. 99.

(*f*) *Kidston* v. *Empire Ins. Co.*, L. R. 1 C. P. 535; *ib.* 2 C. P. 357; 35 L. J. C. P. 250; 36 *ib.* 156; *Meyer* v. *Ralli*, 1 C. P. D. 358.

is a total loss *pro tanto* (*g*); "but, when the insurance is upon the bulk, and the goods are all of the same species, unless the loss exceeds the value specified in the memorandum, there is no average or partial loss, and there cannot, in such a case, be a total loss of a portion of the cargo" (*h*). Where an insurance had been effected on [illegible] generally, and several thousand bags of linseed were put on board, and, by the memorandum as to average, seed was warranted free from average, the Court of Exchequer Chamber thought it was necessary, in the natural construction of the terms of the policy, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the warranty could not apply to each bag in which the seed happened to be packed as a distinct object (*i*); but, where the goods insured were described in the policy as "master's effects," and the memorandum was "free from all average," and some of the goods thus insured were totally lost, and others were saved, it was held that, as the articles which constituted "master's effects" were essentially different in their nature, and kind, and value, the insurer was liable in respect of the total loss of particular articles constituting "master's effects." To hold that, if the insured happens to be successful in rescuing any of the articles insured, even the clothes he may be wearing, he will thereby incur the penalty of forfeiting his insurance on the rest, though they are all totally lost, would lead to a result quite at variance with the object for which the memorandum as to average was introduced into policies (*k*). As soon as it is ascertained that the goods are of different species, it is as if the different species had been enumerated (*l*).

If the contents of any particular package, hogshead, &c., separately insured, are not totally destroyed, the loss is then only a partial or average loss, and the underwriters are exempted, by the memorandum, from liability (*m*). It is usual, therefore, to modify the effect of the memorandum by an express stipulation to the effect that the underwriters are to pay "average on each species of produce, or package of manufactured goods, or on each ten, fifteen, or twenty hogsheads, &c.," so as to give the insured a right to claim for an average or partial loss separately on each species, if the loss amounts to three or five per cent., although there may not have been a three or five per cent. loss upon the whole. This stipulation does not oust the claim of the assured in respect of a general average loss (*n*). If several average or partial losses take

(*g*) *Entwisle* v. *Ellis*, 2 H. & N. 555; 27 L. J. Ex. 105; *Davy* v. *Milford*, 15 East, 559.

(*h*) *Hills* v. *Lond. Ass. Co.*, 5 M. & W. 569.

(*i*) *Ralli* v. *Janson*, 6 Ell. & Bl. 422.

(*k*) *Duff* v. *Mackenzie*, 3 C. B. N. S. 16.

(*l*) *Wilkinson* v. *Hyde*, *ib.* 44.

(*m*) *Hedburg* v. *Pearson*, 7 Taunt. 154; *Navone* v. *Haddon*, 9 C. B. 43; 19 L. J. C. P. 161.

(*n*) *Hagedorn* v. *Whitmore*, 1 Stark. 157.

place under three or five per cent. *each*, but the aggregate amount of the whole exceeds three or five per cent., the underwriters will be liable (*o*). Whenever the policy is made free from average under so much per cent., and a loss happens, the proportion which the loss bears to the cargo must be calculated upon the cargo which was on board at the time of the loss (*p*). The petty charges of primage and average, previously mentioned (*ante*, p. 514) as incident to navigation, form part of the necessary and ordinary expenses of the voyage; and the payment of them is not considered a loss within the meaning of the policy.

Of the exceptions of general average losses and stranding of the vessel.—General average losses arising from general contribution by the owners of property exposed to a common peril of the seas to make good a loss incurred for the preservation of the common property of all (*ante*, pp. 514, 515), must be made good by the underwriter under the general terms of the policy; and, when they are excepted from the average clause, the underwriter, of course, continues responsible in respect of them, although he is exempted from liability in respect of all other partial or average losses. To the clause "warranted free from average" is frequently annexed, as we have already seen, the exception "unless the ship be stranded." By the stranding of the vessel, under such a clause, the exemption from average is destroyed; and the loss falls within the general words of the policy, although it was not in any wise occasioned by the stranding (*q*). It is said to be a rule that, where a vessel takes the ground in the ordinary and usual course of navigation and management in a tidal river or harbour upon the ebbing of the tide or from natural deficiency of water, so that she may float again upon the flow of the tide or increase of water, such an event is not to be considered a stranding within the sense of the memorandum; but it is otherwise where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual and accidental occurrence (*r*). Where a ship ran on some wooden piles four feet under water which had been erected in a river about nine yards from the shore to keep up the banks, and lay on such piles until they were cut away, this was held to be a stranding within the policy (*s*). But, if the vessel merely grounds on a rock and gets off when the tide rises, and pursues her voyage, this is not a stranding, though the vessel may be injured; "if it is touch and go with the ship, there

(*o*) *Blackett* v. *R. Ex. Ass. Co.*, 2 Cr. & J. 244.

(*p*) *Rohl* v. *Parr*, 1 Esp. 444.

(*q*) *Burnett* v. *Kensington*, 7 T. R. 210; *Roux* v. *Salvador*, 4 Sc. 1.

(*r*) *Wells* v. *Hopwood*, 3 B. & Ad. 34; *Kingsford* v. *Marshall*, 8 Bing. 458; 1 M. & Sc. 657; *Letchford* v. *Oldham*, 5 Q. B. D. 538, C. A.

(*s*) *Dobson* v. *Bolton*, 1 Park. Ins. 239; *Rayner* v. *Godmond*, 5 B. & Ald. 225.

is no stranding" (*t*). But, when the ship accidentally takes the ground and remains there for any time, this constitutes a stranding, without reference to the damage sustained by the vessel (*u*) If the shore tackling, placed to keep the vessel upright when the tide leaves her, breaks, and she rolls over on her side and is stove in, this is a stranding (*v*). Where a ship, having encountered bad weather, and lost both her anchors, and had her masts cut away, was taken in tow by salvors, and placed on a bank out of the ordinary course of the voyage, where she lay on her port side for several tides, and sustained considerable further injury, it was held that there was a stranding (*x*). The stranding of a lighter, in which goods are being taken from the ship to the shore, is not a stranding of the vessel within the exception in the policy (*y*). The stranding must of course, in all cases, take place during the voyage covered by the policy, and before the risk thereon terminates.

A clause in a policy "general average as per foreign statement," means that general average in the policy shall include such losses as the law of the port of adjustment regards as intentional sacrifices made for the benefit of the whole adventure, although such losses may not be general average according to English law (*z*). The mere temporary suspension of the voyage for repairs at a port of refuge does not warrant an average adjustment at that port as between shipowner and owner of cargo; and the shipowner is not entitled to *pro ratâ* freight, unless it is shown that the owner of the goods had an option of having them sent on or of accepting them at that port (*a*).

Suing and labouring clause.—This clause, in its usual form, is not limited in construction to a case where the assured abandons, or may perchance abandon, so that the expense incurred is not only in respect of a subject-matter in which the underwriters are interested, but upon property which, by the abandonment, actually becomes or may become theirs. It extends to every case in which the subject of insurance is exposed to loss or damage, for the consequences of which the underwriters would be answerable and in warding off which labour is expended (*b*). Where a shipowner has incurred expense for the purpose of averting a loss of freight, he is entitled to recover under the suing and labouring

(*t*) Ld. Ellenborough, *Macdougle* v. *R. Ex. Ass. Co.*, 4 Campb. 283.

(*u*) *Harman* v. *Vaux*, 3 Campb. 429; *Barrow* v. *Bell*, 4 B & C. 736.

(*v*) *Bishop* v. *Pentland*, 7 B. & C. 219.

(*x*) *De Mattos* v. *Saunders*, L. R. 7 C. P. 570.

(*y*) *Hoffman* v. *Marshall*, 2 Sc. 564.

(*z*) *Mavro* v. *Ocean Marine Ins. Co.*, L. R. 9 C. P 595, 10 C. P. 414.

(*a*) *Hill* v. *Wilson*, 4 C. P. D. 329.

(*b*) *Kidston* v. *Empire Insurance Co.*, L. R. 1 C. P. 535; 2 C. P. 357; 36 L. J. C. P. 156.

clause so much thereof as was reasonably incurred (c). The application of this clause is not excluded by the word "warranted free from particular average" (d). The plaintiff insured a ship with the defendant, which suffered sea damage and incurred salvage expenses. When repaired, the ship was more valuable than when insured. The plaintiff brought his action for a partial loss. There was a suing and labouring clause. It was held that the plaintiff was not entitled to recover a proportion of the salvage expenses in addition to the sum insured; for that salvage (properly so called) and general average expenses do not come within the words or object of a suing and labouring clause (e).

Valuation and adjustment of losses—valued and open policies—Over-valued policies—Calculation of the value—Deduction for new materials.—The question as to whether there is a total or partial loss is independent of the question whether the policy is valued or not valued. If the whole of the subject-matter covered by the insurance is lost, it is a total loss; if a part only is lost, the loss is a partial loss, the amount of which depends on the proportion the part lost bears to the whole subject-matter of the insurance. Thus, if the policy is a valued policy, the value being admitted, the assured is entitled to be indemnified to the extent of the declared value in the policy, and is released, as previously mentioned, from proving the value, unless the valuation can be impeached by the underwriter. If the policy be an open policy, the value of the whole subject-matter of insurance must be proved (*f*). If the policy can be shown to have been fraudulently overvalued, it will be void (*ante*, pp. 675, 976). But, if the declared value exceeds the interest of the assured through some mistake or misapprehension, the loss will be adjusted in the same manner as if the policy were an open policy, and the computation be made by the real interest on board, and not by the value in the policy (*g*). Where several valued policies of insurance are effected upon the same vessel valued differently, and upon a total loss occurring the insured receives under some of the policies part of the sums insured, in an action upon another policy, he is only entitled to recover the difference between the amount received and the agreed value in that policy (*h*). If the policy be an open policy on a ship, the value is taken to be the sum the ship is worth to the owner at

(c) *Lee* v. *The Southern Insurance Co.*, L. R. 5 C. P. 397.

(d) *Kidston* v. *Empire Insurance Co.*, L. R. 1 C. P. 535; 2 C. P. 357; 36 L. J. C. P. 156; *Meyer* v. *Ralli*, 1 C. P. D. 358.

(e) *Aitchison* v. *Lohre*, 4 Ap. Cas. 755.

(*f*) *Tobin* v. *Harford*, 34 L. J. C. P. 37.

(*g*) *Le Cras* v. *Hughes*, 3 Doug. 81; *Williams* v. *North China Ins. Co.*, 1 C. P. D. 757, C. A.; see, however, *Barker* v. *Janson*, *ante*, p. 676.

(*h*) *Bruce* v. *Jones*, 1 H. & C. 769; 32 L. J. Ex. 132.

the port where the voyage commences, including stores, furniture, provisions, wages, advances to sailors, and all expenses of outfit, to which are added the premium and costs of insurance. If it be an open policy on goods, the value is taken to be the prime cost of the goods as proved by the invoices and tradesmen's bills, adding thereto the shipping charges, and premium, and costs of insurance. The presumed value of the goods, if they had reached their place of destination and been sold there, has nothing to do with the calculation of the outset value. The insurer has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods. If they be totally lost, he must pay the prime cost, that is the value of the thing he insured at the outset: he has no concern in any subsequent value (*i*). If the policy is a valued policy on a ship at and from A. to B., and the ship while at A. undergoing repairs is burnt so as to become a total loss, the underwriter is not entitled to deduct from the value the estimated expense of the repairs necessary to make the ship seaworthy for the voyage, but must pay the total agreed value (*k*). If a ship insured has sustained a partial loss, as, for instance, if she has been damaged, and the damage has been repaired by the owner, the latter will not be allowed to receive from the underwriter more than two-thirds of the costs of the repairs, it being considered that a deduction of one-third ought to be made in favour of the underwriters, by reason of the owner's having the benefit of new materials instead of old (*l*), unless the vessel is on her first voyage (*m*).

Of the standard of value and measure of depreciation.—If a partial loss has been sustained on goods and merchandise, this loss is calculated and adjusted by comparing the selling price of the sound commodity with the selling price of the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i.e.*, it gives the aliquot part of the original value which may be considered as destroyed by the perils insured against, and for which the insured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated portion of loss to the standard by which the value is calculated (*i.e.*, to the declared value in the case of a valued policy, and to the invoice price, &c., in the case of an open policy), "and you then get the one-half, the one-fourth, or one-eighth of the loss to be made good in terms of money (*n*). If part of the cargo

(*i*) *Lewis v. Rucker*, 2 Burr. 1170.
(*k*) *Lidgett* v. *Secretan*, L. R. 6 C. P. 616.
(*l*) *Poingdestre* v. *R. Ex.*, R. & M. 378; *Da Costa* v. *Newnham*, 2 T. R. 412.
(*m*) *Pirie* v. *Steele*, 2 Mood. & Rob. 49.
(*n*) *Usher* v. *Noble*, 12 East, 647.

capable of a several and distinct valuation at the outset, be totally lost, as if there be one hundred hogsheads of sugar, and ton happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold. But, where one hogshead happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage; but, if you can fix whether it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. This is to be found out, not by any price at the outset port, but at the port of delivery, where the voyage is completed and the whole damage known. Whether the price there be high or low, it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value; and, as the insurer pays the whole prime cost if the thing be wholly lost, so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged. For instance, suppose the value in the policy to be 30*l.*, the goods are damaged, but sell for 40*l.*; if they had been sound, they would have sold for 50*l.* The difference then between the sound and the damaged is a fifth: consequently, the insurer must pay a fifth of the prime cost or value in the policy, that is, 6*l.*; *e converso*, if they come to a losing market and sell for 10*l.*, being damaged, but would have sold for 20*l.* if sound, the difference is one half, and the insurer must pay half the prime cost or value in the policy, that is, 15*l.* (*o*). To put the matter in another shape, "If goods valued at 100*l.*, and coming to a good market, would, if sound, have been sold for 120*l.*, but are so damaged as not to fetch more than 40*l.*, the loss will be that proportion of the prime cost (100*l.*), which the difference between the price of the damaged and the price of the sound goods (80*l.*) bears to the price of the sound, 120*l.* Thus, if 120*l.* : 80*l.* : : 100*l.* :—the answer is 66*l.* 13*s.* 4*d.*, the true loss" (*p*). This mode of calculation furnishes a criterion by which the amount of the deterioration on the damaged goods may be ascertained, without involving the underwriter in the fluctuations of a rising or falling market. The merchant in this way makes the market prices of the sound and damaged commodity serve "as the scales in which to weigh the depreciation" (*q*).

Liabilities of underwriters with reference to the amount of their subscriptions.—The underwriters are liable for total or average losses in proportion to the sums they have underwritten. Thus, if

(*o*) *Lewis* v. *Rucker*, 2 Burr. 1170.

(*p*) Marshall on INSURANCE, 634, 3rd ed.; *Johnson* v. *Sheddon*, 2 East, 581; *Hurry* v. *R. Ex. Ass. Co.*, 3 B. & P. 308; *Tunno* v. *Edwards*, 12 East, 488.

(*q*) Stevens on AVERAGE, 84.

a man underwrite 100*l.* upon property valued at 500*l.* and a total loss happen, he shall pay 100*l.*, that being the amount of his subscription; and, if only an average loss, amounting to 60*l.* or 70*l.* per cent., then he shall pay only 60*l.* or 70*l*, being his proportion of the loss. The liability of the underwriter is not restricted to the amount of his subscription; for he may be subject to an average and a total loss in the same voyage, or for several average or partial losses amounting together to more than his subscription (*r*). But the insured cannot, of course, in any case, recover anything beyond that which is a strict indemnity for losses actually sustained. If several articles be insured for one sum, with a distinct valuation on each, or so much upon ship, and so much upon cargo, and no part of the cargo be taken on board, so that the risk upon that never attaches, the insured will recover only such a portion of the sum insured as the value of the article lost bore to the value of the whole (*s*). In the case of open policies on freight, the usage is to calculate the loss upon the gross amount, and not upon the net value of the freight (*t*). When part of the goods insured is saved and the salvage exceeds the amount of the freight, the practice is to deduct the freight from the value of the goods saved, and to make up the loss upon the difference (*u*).

Signed adjustments.—When an adjustment has been made of the amount of the loss, and indorsed upon the policy and signed by the underwriter, this binds the latter, unless he can show that it was made on wrong information, or under a mistake, or under the influence of misrepresentations (*x*). The adjustment is not an absolute and final settlement which is to be conclusively binding upon the parties (*y*); but, when the underwriter has once settled for the loss, he cannot recover back the money he has paid, unless there has been actual fraud on the part of the insured. If he pays for a total loss, which afterwards turns out to have been only an average loss, he cannot recover back his money, but must do the best he can with the property saved (*z*).

Right of the insurer to recover compensation where the loss or damage has been caused by the negligence of a third party.—After satisfaction made to the owner for the loss or damage, the insurer stands in the place of the insured, and is not only entitled to what can be saved or restored *in specie*, but also to compensation, when compensation is recoverable, for the injury (*a*); and he is therefore

(*r*) *Le Cheminant* v. *Pearson*, 4 Taunt. 367; *Brooks* v. *M'Donnell*, 1 Y. & C. 515.

(*s*) *Amery* v. *Rogers*, 1 Esp. 208.

(*t*) *Palmer* v. *Blackburn*, 1 Bing. 62.

(*u*) *Boyfield* v. *Brown*, 2 Str. 1065.

(*x*) *Herbert* v. *Champion*, 1 Campb. 134; *Shepherd* v. *Chewter*, *ib.* 274; *Gammon* v. *Beverley*, 8 Taunt. 124.

(*y*) *Lucku* v. *Bushby*, 13 C. B. 878.

(*z*) *Da Costa* v. *Firth*, 4 Burr. 1966.

(*a*) *Randal* v. *Cockran*, 1 Ves. sen. 98; *Dickenson* v. *Jardine*, L. R. 3 C. P. 639.

entitled to sue the wrongdoer in the name of the owner of the lost or damaged property, in order to recover compensation for such loss or damage (*b*). If the policy is a valued policy, the damages recovered will belong wholly to the underwriter, although the real value of the ship may exceed that stated in the policy (*c*).

Non-inception of the risk—Over-insurance by mistake—Return of the premium.—If the risk upon the policy never commences, the premium paid to the underwriter is recoverable by the insured, unless the policy has been rendered void by some positive fraud on the part of the latter. Where the risk has not been run, whether owing to the fault, pleasure, or will of the insured, or to any other cause, the consideration for the premium fails; but, if the risk of the contract has once commenced, there can be no apportionment or return of the premium afterwards (*d*). If there are separate voyages and several risks to be run, some of the premiums may be returnable and others not; but, if there is one entire voyage, and one risk, and the risk has commenced, there can be no return of premium (*e*). If the vessel sails in an unseaworthy condition, and there is no fraudulent representation or warranty of seaworthiness in the policy, and no evidence of fraud, the premium is returnable, as the underwriter's risk upon the policy never commenced, by reason of the seaworthiness of the vessel being, as we have before seen, a condition precedent to his liability (*f*). If the policy be on goods to be laden on board the particular vessel, and no goods are put on board, the premium is returnable (*g*); and, if part of the goods covered by the policy only are put on board, a portion of the premium corresponding with the deficiency may be claimed back (*h*). But, if the policy be on freight, the risk may, as we have seen (*ante*, p. 705), attach, although no goods have been put on board; and, if the risk once attaches, the premium cannot be recovered back (*i*). Where several policies have been effected, and, before the risk thereon has commenced, the interest turns out to be less than the amount insured on the whole, the insured is entitled to a reasonable return of premium upon all the policies; but, where an insurance has been effected by one or more policies, and the risk has commenced, and subsequent policies are afterwards signed, and a loss happens between the signing of the first and subsequent policies, the underwriters on the first will be liable in proportion to their subscriptions to the extent of the whole

(*b*) *Mason* v. *Sainsbury*, 3 Doug. 64; *Yates* v. *Whyte*, 5 Sc. 640; *post*, p. 737.
(*c*) *North of England, &c., Ins. Ass.* v. *Armstrong*, L. R. 5 Q. B. 244.
(*d*) *Stevenson* v. *Snow*, 3 Burr. 1238; *Tyrie* v. *Fletcher*, 2 Cowp. 666; *Loraine* v. *Thomlinson*, 2 Doug. 585.
(*e*) *Bermon* v. *Woodbridge*, 2 Doug. 781.
(*f*) *Penson* v. *Lee*, 2 B. & P. 330.
(*g*) *Martin* v. *Sitwell*, 1 Show. 151.
(*h*) *Horneyer* v. *Lushington*, 15 East, 46.
(*i*) *Moses* v. *Pratt*, 4 Camp 298.

sum insured, and therefore, the risk having been incurred by them, a return of the premium cannot be claimed (k). Where property has by mistake been insured for more than it is worth, the underwriter is bound to return the overplus premium; and, whenever it is established to be the custom and usage of trade to return a certain portion of the premium upon certain contingencies, the insured will be entitled to avail himself of the custom (l). Clauses are frequently inserted in policies expressly providing for a return of part of the premium in certain events and contingencies (m). Where an insurance was effected on a ship for a year, and part of the premium was to be returned "for every uncommenced month if sold or laid up," and the vessel had been laid up for several months within the year, but was employed again within the year, this was held not to be such a laying up as entitled the insured to a return of premium (n).

Void policy—Return of the premium.—If a policy is rendered null and void by reason of a written misrepresentation or misstatement made by the insured by mistake and without fraud, the insured will be entitled to a return of his premium (o). But, if the insured has effected a fraudulent insurance with the view of cheating the underwriters, the law will not enable him to recover back the premium he has paid (p). If the insurance is illegal, as, for instance, if it has been effected upon an unlawful voyage or adventure, such as a smuggling enterprise, or a trading with foreign enemies, or a trading in breach of the navigation laws, and is consequently void, the premium cannot be recovered back if the unlawful voyage or adventure has been undertaken and both parties are *in pari delicto;* but there is a *locus penitentiæ*, so long as the contract continues executory (q). And, if an insurance be effected on a trading adventure with foreign enemies, and be consequently illegal in its inception, so that the risk never commences, yet, if it was always in the contemplation of the parties to obtain a licence legalising the trade, and they intended to insure a legal and not an illegal voyage, but from some mistake or misapprehension the licence was not obtained in sufficient time to legalise the adventure and enable the insured to recover upon the policy, the premium paid for such insurance is recoverable, as there was no intention on the part of the insured to violate the law (r). So, if

(k) *Fisk* v. *Masterman*, 8 M. & W. 165.
(l) *Long* v. *Allen*, 2 Park, Ins. 797.
(m) *Aguilar* v. *Rodgers*, 7 T. R. 421.
(n) *Hunter* v. *Wright*, 10 B. & C. 714.
(o) *Feise* v. *Parkinson*, 4 Taunt. 640.
(p) *Chapman* v. *Fraser*, 1 Park. Ins. 456.
(q) *Johnston* v. *Sutton*, 1 Doug. 254; *Lubbock* v. *Potts*, 7 East, 449.
(r) *Hentig* v. *Staniforth*, 5 M. & S. 124.

the insured was ignorant of the illegality of the voyage at the time he effected the insurance and paid the premium, as, for instance, if he did not know that hostilities had broken out, and that the parties with whom he was trading had at the time become foreign enemies, the premium is recoverable (*s*). Non-compliance with the requirements of the Merchant Shipping Acts respecting the engagement of the crews of British vessels does not render the voyage illegal, but only furnishes ground for proceedings against the master for the breach of the statute (*t*). On the sale of a thing insured, no interest in the policy passes to the vendee unless at the time of the sale the policy is assigned either expressly or impliedly (*u*).

SECTION III.

OF FIRE INSURANCE.

Of contracts of insurance against peril of fire.—When the underwriter, in consideration of a premium, undertakes to indemnify the insured against loss of, or injury to, property from fire, the contract is a contract of fire insurance, and the instrument by which it is effected is called a FIRE POLICY. In a contract of this kind, the insurers, after reciting the receipt of the premium, usually covenant or agree that, from a day named in the policy, unto, and inclusive of, another day named therein, and so long as the insured shall pay or cause to be paid the premium agreed upon, and the insurer shall accept the same, they, the insurers, will make good any loss or damage by fire to the property insured, except loss or damage from fire caused by foreign enemies, &c. When the policy refers to printed proposals, as embodying the terms upon which the insurance is effected, these proposals form part of the contract, and the policy and proposals must be read and construed together. The insured must have a pecuniary interest in the property exposed to risk, or he must be accountable or responsible to some person for the safety or security of the property (*a*). If he has no such interest or accountability, the contract will be void at common law, independently of the 14 Geo. 3, c. 48, as being contrary to

(*s*) *Oom* v. *Bruce*, 12 East, 225.
(*t*) *Redmond* v. *Smith*, 8 Sc. N. R. 268.
(*u*) *Powles* v. *Innes*, 11 M. & W. 10; *North of England Oil Cake Co.* v. *Archangel Ins. Co.*, L. R. 10 Q. B. 249.
(*a*) *Marks* v. *Hamilton*, 7 Exch. 323; 21 L. J. Ex. 109.

public policy, and holding out the strongest possible temptation to arson; but it is not necessary, to give the insured an insurable interest, that he should have the absolute property in the things insured. If he has a lien on them for money due to him, or if he holds them as a bailee, or depositary, or warehouseman, or as a commission-agent for sale, or as an artificer, or a common carrier, or is employing his work and labour upon them, he may lawfully insure them to their full value as goods held in trust or on commission, and may keep up a floating policy upon them for his own benefit and the benefit of his present and future customers (*b*). Where, however, the insurers had specially limited their liability to "goods on trust or on commission for which the insured are responsible," it was held that they were not liable for loss to goods sold, and in which the property had passed to the purchaser, although the insured held the delivery warrants for the convenience of paying the charges on the goods which were in bond (*c*). If the insured is a bankrupt in possession of after-acquired property by permission of his trustee, he has an insurable interest (*d*).

Parties entitled to the benefit of the insurance.—By the 22 & 23 Vict. c. 35, s. 7, it was enacted, that the person entitled to the benefit of a covenant to insure against loss or damage by fire shall have the same advantage from any insurance not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant. This section has been repealed by the 44 & 45 Vict. c. 41, s. 14, and Sch. II., Part I., and its place is practically supplied by the relief against forfeiture contained in s. 14 of the above Act (*e*). A purchaser of property insured against fire does not, by the purchase, acquire a right to the benefit of the policy (*f*). Where machinery was mortgaged by a bill of sale, which contained a covenant to insure, but no provision for the application of the policy moneys in case of fire in liquidation of the mortgage debt, and the machinery was burnt, it was held that the mortgagee had no claim to the benefit of the policy as against the mortgagor (*g*). So also a lessee with an option of purchase has no right after a fire to exercise his option and claim the insurance money (*h*).

Things covered by the policy.—An insurance on "household

(*b*) *Tasker* v. *Scott*, 6 Taunt. 234; 1 Marsh. 556; *Lond. & North.-West. Ry. Co.* v. *Glyn*, 28 L. J. Q. B. 193; 1 El. & El. 652; *Waters* v. *Monarch Insurance Co.*, 5 Ell. & Bl. 870; 25 L. J. Q. B. 102.

(*c*) *North British Ins. Co.* v. *Moffat*, L. R. 7 C. P. 25; 41 L. J. C. P. 1; and see *Martineau* v. *Kitchen*, L. R. 7 Q. B. 436, 457; 41 L. J. Q. B. 227.

(*d*) *Marks* v. *Hamilton*, 7 Ex. 323; 21 L. J. Ex. 109.

(*e*) See *ante*, p. 261.

(*f*) *Poole* v. *Adams*, 33 L. J. Ch. 639.

(*g*) *Lees* v. *Whiteley*, L. R. 2 Eq. 143; 35 L. J. Ch. 142.

(*h*) *Edwards* v. *West*, 7 Ch. D. 858.

furniture, linen, and wearing apparel," will not include linen drapery bought on speculation (*i*); nor will an insurance on the "interest in an inn" include the profits of the publican's trade (*k*); nor an insurance on "an oil mill and millwright's gear therein" include machinery in a separate detached building, although it is worked by the same moving power, and considered to be part of the mill (*l*). If a building be described as of one class instead of another requiring a larger premium, the policy will be nugatory (*m*).

Warranties.—Every statement, condition, and representation, material to the risk, will amount to a warranty, but not statements and representations concerning matters which do not form the basis of the contract and regulate the risk (*n*).

Alteration of premises increasing the risk.—In every policy of insurance against fire there is an implied promise or undertaking on the part of the insured that he will not, after the making of the policy, alter the premises so as to increase the risk. If he converts a house of two stories into a house of three stories, the liability of the insurer is increased; the premium, if previously fair, has then become inadequate, and the underwriter is discharged (*o*). It has been held that, if it is stated or asserted in the description of the premises in the policy, "that no fire is kept on the premises, and no hazardous goods deposited thereon," this refers merely to the ordinary state and condition of the property; and, if on some particular occasion, for some temporary purpose, fire is brought upon the premises, or hazardous goods are temporarily or casually placed thereon, and a loss by fire consequently occurs, the policy is not forfeited, and the underwriters are not discharged (*p*). Where premises were insured as "a granary and kiln for drying corn," and the policy was to be void if the premises were not accurately described, or any alteration was made in the building, or the risk was increased, and on one occasion, in consequence of a barge laden with bark having been sunk in the adjoining river, and the bark wetted, the assured permitted the bark to be dried gratuitously in the kiln, and the bark and kiln took fire, and the whole premises were destroyed, it was held that the underwriters were nevertheless liable upon the policy to make good the loss, on the ground that the stipulation as to subsequent alterations in the premises or the risk referred to something permanent and habitual,

(*i*) *Watchorn* v. *Langford*, 3 Campb. 422.

(*k*) *Wright* v. *Pole*, 1 Ad. & E. 621.

(*l*) *Hare* v. *Barstow*, 8 Jur. 928.

(*m*) *Newcastle Fire Ins. Co.* v. *Macmorran*, 3 Dow. 255.

(*n*) *Benham* v. *Un. Guar., &c.*, 7 Exch. 744; *Baxendale* v. *Harvey*, 4 H. & N. 450; S. C. nom. *Baxendale* v. *Harding*, 28 L. J. Ex. 236.

(*o*) *Sillem* v. *Thornton*, 3 Ell. & Bl. 882; 23 L. J. Q. B. 368.

(*p*) *Dobson* v. *Sotheby*, M. & M. 90. See, however, *post* p. 733, Notice of Alterations.

and not to a temporary matter; and it was observed that, if the plaintiff had either dropped his business of corn-drying, and taken up that of bark-drying, or added the latter to the former, the case would have come within the condition (*q*).

Notice of alterations.—If by the terms of the policy the insured is to give notice of the erection or use of new stoves or furnaces, or of the making of any alterations increasing the risk, and pay an increased premium, this, it has been held, refers to some permanent alteration or user, and not to a mere temporary or casual matter (*r*). But the authority of these cases is somewhat doubtful; and it has been held that, where, by the terms of the policy, steam-engines, stoves, or any description of fire-heat other than common fire-places, are not to be used unless notice has been given and the use allowed, the policy will be avoided if a steam-engine, with furnace attached, is brought on the premises, and used only on one or two occasions for experimental purposes, and not in the business of the insured (*s*); but it must be proved that the risk of fire was increased by the thing done (*t*).

Misdescription of the insured premises.—Where, by the terms of a policy, the houses, buildings, or other places where insured goods were deposited, were to be accurately described, and a lodger who had only one room in a house effected an insurance upon goods therein, describing them as being in his "dwelling-house," it was held that the description was sufficiently accurate (*u*). A coffee-house keeper who does not furnish beds and lodgings for the night does not carry on the trade of an inn-keeper within the meaning of a policy enumerating the trade of an inn-keeper as doubly hazardous, and requiring an increased premium for the insurance of buildings where it is carried on (*x*). When mills are warranted to be worked by day only, and they are put in motion by means of shafts worked by steam power in an adjoining building, the warranty is not broken by the steam-engine and shafts being kept going all night to turn other mills, if it appears that the machinery of the insured mill was disconnected at night from the moveable shafts, and that the mill itself had ceased to work (*y*).

Fraudulent concealment of circumstances materially affecting the risk.—If any unusual and extraordinary risk is known by the assured to exist at the time the policy is effected, and is not

(*q*) *Shaw* v. *Robberds*, 6 Ad. & E. 83.

(*r*) *Pim* v. *Reid*, 6 Sc. N. R. 982; *Barrett* v. *Jermy*, 3 Exch. 545.

(*s*) *Glen* v. *Lewis*, 8 Exch. 617; 22 L. J. Ex. 228.

(*t*) *Stokes* v. *Cox*, 1 H. & N. 533; 26 L. J. Ex. 113.

(*u*) *Friedlander* v. *Lond., &c.*, 1 M. & Rob. 171.

(*x*) *Doe* v. *Laming*, 4 Campb. 76.

(*y*) *Whitehead* v. *Price*, 2 C. M. & R. 447; *Mayall* v. *Mitford*, 6 Ad. & E. 670.

disclosed to the underwriter, this is a fraudulent concealment, which deprives the insured of all right of action upon the policy. Where a warehouse adjoining a boat-builder's shop took fire, and the fire was apparently extinguished, and the boat-builder sent immediate instructions for the insurance of his shop and premises, without communicating the fact of the neighbouring fire to the insurers, and the fire was not in fact extinguished, but broke out again on the following morning, and extended to the boat-builder's shop and premises and consumed them; it was held that the concealment of the increased risk from the recent existence of the adjoining fire avoided the policy (z).

Risks covered by the policy.—As the insurers take upon themselves only the risk of fire, they will not be responsible unless there has been actual ignition of the property insured. If it has been damaged merely from atmospheric concussion caused by an explosion of gunpowder at a distance (a), or from the heat or smoke of ordinary flues and chimneys which have been overheated and mismanaged, and there has been no outbreak of fire, they will not be responsible upon the policy (b). Where it was provided that the insurers should not be liable if the property should be burnt "by foreign enemies, or any military or usurped power," and it was set on fire by a mob excited by the high price of provisions, it was held that this was not a burning by an usurped power within the meaning of the proviso (c). But, if the insurers exempt themselves from liability for losses by fire "happening from civil commotion," they will not be responsible for damage resulting from the incendiarism of a rebellious mob, or from the insurrection of the people (d). The insurer who has paid a loss of this kind may sue the hundred upon the Riot Act in the name of the insured (e). A policy contained an exception of "loss or damage by explosion, except for such loss or damage as shall arise from explosion of gas:" an explosive vapour escaped and caught fire, setting fire to other things: it afterwards exploded and caused a further fire, besides doing damage by the explosion: and it was held that the word "gas" meant ordinary coal gas, and did not include the explosive vapour, and that the exemption applied to the damage caused by the subsequent explosion and its consequences just as much as to a fire originated by explosion (f).

Where a ship was insured for three months against fire, and

(z) *Bufe* v. *Turner*, 6 Taunt. 338.

(a) *Everett* v. *Lond. Ass. Co.*, 19 C. B. N. S. 126; 34 L. J. C. P. 299.

(b) *Austin* v. *Drewe*, 6 Taunt. 436.

(c) *Drinkwater* v. *Lond. Ass. Co.*, 2 Wils. 363.

(d) *Langdale* v. *Mason*, 2 Park. Ins. 965.

(e) *Clark* v. *Hundred of Blything*, 2 B. & C. 254; *Yates* v. *Whyte*, 5 Sc. 640; 4 Bing. N. C. 272.

(f) *Stanley* v. *The Western Insurance Co.*, L. R. 3 Ex. 71.

was described as lying in the Victoria wet docks, with liberty to go into a dry dock for repairs, it was held that she was covered by the policy whilst passing along the Thames, in her way from the wet dock to the dry dock, but not whilst she was lying in the river for the purpose of re-fixing her paddle-wheels, or for purposes of repair (*g*). And where the risk was stated to be on four pumps "at and from Ardrossan to the steamer ashore at Drogheda, and while there engaged at the wreck and until again returned to Ardrossan, &c.," it was held that this did not include the risk while the pumps were on board the wreck on a voyage to Belfast, a port of safety (*h*).

Under the words "from the 14th of February until the 14th of August," the whole of the 14th of August was held to be included (*i*).

Fires caused by negligence—Extraordinary risks.—One of the objects of insurance against fire is to guard against the negligence of servants and others; and therefore the simple fact of negligence has never been held to constitute a defence against the claim of the insured; and there is no distinction between the negligence of servants and agents and of the insured himself (*k*). But the underwriters do not take upon themselves extraordinary risks, unless those risks are expressly brought to their notice, and are accepted and insured against by them at the time the policy is effected.

Notice of loss—Partial losses.—By the terms of most contracts for insurance against fire, the insured is required to give, within a certain number of days, notice of the loss to the insurers, and to deliver full particulars of the damage sustained, and prove the amount of it, and procure a certificate of his character and circumstances from the minister and churchwardens, or certain reputable inhabitants of the parish; and the strict performance of these things in point of time, and the substantial performance of them in other respects, constitute a condition precedent to the right of the insured to be indemnified for his loss (*l*). By the term "full particulars" is meant the best particulars the insured can reasonably give (*m*). When a partial loss only has been sustained of the property insured, the insured is, of course, entitled only to be indemnified to the extent of such partial loss. To

(*g*) *Pearson* v. *Commerce Un. Ass. Co.*, 15 C. B. N. S. 304; 33 L. J. C. P. 85; L. R. 8 C. P. 548; 1 Ap. Cas. 498; *ante*, p. 695.

(*h*) *Wingate* v. *Foster*, 3 Q. B. D. 582.

(*i*) *Isaacs* v. *Royal Ins. Co.*, L. R. 5 Ex. 296.

(*k*) *Busk* v. *R. Ex. Ass. Co.*, 2 B. & Ald. 73.

(*l*) *Roper* v. *Lendon*, 28 L. J. Q. B. 260; 1 El. & El. 825; *Worsley* v. *Wood*, 6 T. R. 710.

(*m*) *Mason* v. *Harvey*, 8 Exch. 819; 22 L. J. Ex. 336.

permit him to recover more, and put himself in a better situation than he was in before the loss occurred, would, as previously observed, be totally opposed to the nature of a contract of insurance as a mere contract of indemnity. If a reasonable suspicion exists that houses or buildings situate within the bills of mortality have been insured for more than their value and fired, but proof is wanting, the insurers may rebuild or repair at their own expense, and resist the claim of the insured for the money secured by the policy (*n*).

Forfeiture of the policy—Non-payment of premium—Days of grace.—Where the insurance is for a year, and so on from year to year, or for a quarter of a year, and so on from quarter to quarter, it is not kept alive after the expiration of the year or quarter by a mere proviso or condition giving a certain number of days of grace for the payment of the premium; but there should be an express stipulation that the insurance shall be continued and the property covered by the policy, until the expiration of the days of grace (*o*). Where a policy of insurance against loss by fire from year to year provided that the insured should, "as long as the managers agreed to accept the same, make all future payments annually at the office within fifteen days after the day limited by the policy, upon pain of forfeiture of the benefit thereof, and no insurance is to take place until the premium be actually paid," and a loss happened within fifteen days after the end of one year, but before the premium for the next was paid, it was held that the insurers were not liable, although the insured tendered the premium within the fifteen days, but after the loss; that the insurance was for a year, and not a year and fifteen days, and the policy at an end by non-payment at the very day; and that, the receipt of the premium being in the discretion of the insurers, they had clearly a right to refuse to continue the policy (*p*). Where there was a condition in a policy that the insured "should forfeit all benefit under his policy," if there was any false swearing in support of the claim he made, and the assured made an affidavit of damage to the amount of 1081*l*., and the claim was contested, and a jury gave a verdict for 500*l*. only the court granted a new trial (*q*).

Divers insurances on the same property.—If the insured has effected two or more insurances upon the same property, he can, as we have before seen, recover no more than his actual loss; and, when he has obtained a full indemnity from the one he cannot

(*n*) *Vernon* v. *Smith*, 5 B. & Ald. 1; and see *post*, p. 738.

(*o*) *Salvin* v. *James*, 6 East, 571.

(*p*) Ashurst, J., *Tarleton* v. *Staniforth*, 5 T. R. 700; 1 B. & P. 471; *Simpson* v. *Accid. Death Ins. Co.*, 2 C. B. N. S. 298.

(*q*) *Levy* v. *Baillie*, 7 Bing. 349.

resort to the other; but, as he is allowed to fix on which insurer he pleases, the law permits the one who has been compelled to make good the loss to resort to the others for contribution, and to recover from them a rateable proportion of the loss against which they have all insured (*r*). If the insurer pays the money, and subsequently the insured receives compensation from any other sources for his loss, the insurer is entitled to recover from the insured any sum in excess of the loss (*s*). There is no reason why the principle in respect of contribution should not be the same in respect of fire policies as they are in respect of marine policies, and if the *same person in respect of the same right* insures in two offices, there is no reason why they should not contribute in equal proportion in respect of a fire policy as they would in respect of a marine policy (*t*).

Insurances by warehousemen and bailees of the goods of their customers.—A warehouseman, wharfinger, common carrier, or bailee of goods, may insure the goods which come to his hands from time to time, in the ordinary course of trade, and may keep up a floating policy for the protection of the goods of his customers deposited in his warehouse, or upon his wharf, or in his boats, barges, or waggons (*u*). It is not necessary that the bailee should have had any previous authority from the owners to insure in order to give him an insurable interest (*x*), nor that he should have made any charge for insurance, nor that he should be in anywise liable to make good to his customers the loss that has been sustained in order to entitle him to recover the full amount of the insurance from the insurers (*y*); but he is not entitled, when he has received the money, to appropriate it to his own use. The money is the money of the owners of the goods, and may be recovered by them from the insurer who has received it (*z*).

Inability of the insured to sue when he has sustained no damnification.—Policies against fire being contracts of indemnity, whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. If, therefore, the loss or damage insured against has been caused by the act or default of some wrong-doer, and the insurer has brought an action

(*r*) *Davis* v. *Gildart*, 2 Park. Ins 601; *Godin* v. *Lond. Ass. Co*, 1 W. Bl 103

(*s*) *Darrell* v. *Tibbetts*, 5 Q. B. D 560, C. A. See also *Castellain* v. *Preston*, 8 Q. B. D. 613.

(*t*) *North British Ins. Co.* v. *London Ins. Co.*, 5 Ch. D. 569, C. A.

(*u*) *Lond. & North-West. Ry Co.* v. *Glyn*, 1 El. & El. 652; 28 L J. Q. B. 188; *Crowley* v. *Cohen*, 3 B. & Ad. 478.

(*x*) *Hagedorn* v. *Oliverson*, 2 M. & S. 485.

(*y*) *Waters* v. *Mon. Life Co.*, 5 Ell. & Bl 880, 25 L J. Q. B. 102; *London & North-West. Ry. Co.* v. *Glyn*, 1 El. & El. 652, 28 L J. Q. B 188.

(*z*) *Randal* v. *Cockran*, 1 Ves. sen. 97; *Yates* v. *Whyte*, 5 Sc. 640; *Sidaways* v. *Todd*, 2 Stark. 400; *Lond. & North-West. Ry Co.* v. *Glyn*, 1 El. & El. 652; 28 L J Q. B. 192.

and recovered full compensation from such wrong-doer, he has then no ground to sue for an indemnity upon the contract of insurance; but, if the compensation he receives falls short of the real injury, an action would be maintainable for so much as would suffice to constitute a complete indemnity.

Rights of insurer and insured as against wrong-doers causing the loss.—Every insurer has a right to be put in the place of the insured, and to use the name of the latter in order to recover compensation from a wrong-doer who has caused the loss (*a*). If, therefore, the insurer has paid the amount of a loss caused by the wrongful act of a third party, he has a right to sue the latter in the name of the insured to recover compensation for the injury; and, if the insured receives from the insurer the amount insured, or full indemnity for his loss, and, after that, brings an action against, and obtains compensation from, a wrong-doer, he is not entitled to double satisfaction, and cannot put the money into his own pocket, but is a trustee thereof for the benefit of the insurer, and is bound to hand it over to the latter.

Assignment of fire policies.—A purchaser of property which is insured does not, by the mere fact of the purchase, and in the absence of any agreement to that effect, acquire any right to the insurance moneys (*b*).

Laying out insurance money in re-building.—By the 14 Geo. 3, c. 78, s. 83, the governors and directors of insurance offices are authorised, upon the request of any persons entitled to any house or other buildings which may be burnt down or damaged by fire, or upon any grounds of suspicion that the owners or occupiers, or other parties effecting the insurance, have been guilty of fraud or incendiarism, to cause the insurance money to be laid out in re-building (*c*). Trade fixtures put up by a tenant, being removable by him, are not comprised in the expression "house or other buildings" in the statute. Therefore, where such fixtures are separately insured and destroyed by fire during the tenancy, the landlord is not entitled to have the insurance money laid out under the Act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, as conferring a mere personal right resting in contract, makes no difference in this respect (*d*). In order to entitle an owner to have the money laid out in re-building, he must make a distinct request to that effect to the insurance

(*a*) *Mason* v. *Sainsbury*, 3 Doug. 64; *Clark* v. *Blything*, 2 B. & C. 254; 3 D. & R. 489; see *Simpson* v. *Thompson*, 3 Ap. Cas. 279; *ante*, p. 727.

(*b*) *Poole* v. *Adams*, 33 L. J. Ch. 639.

(*c*) The operation of this section is not limited to the metropolis, but is of universal application; *Filliter* v. *Phippard*, 11 Q. B. 347; *Ex parte Goreley*, 34 L. J. Bank. 1.

(*d*) *Gorely, ex parte*, 34 L. J. Bank. 1.

office before they have settled with the tenant insuring; and in no case is the owner entitled himself to re-build and claim the policy money (*e*).

SECTION IV.

OF LIFE INSURANCE.

Of contracts of life assurance.—"The contract commonly called life insurance is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life, and, when once fixed, it is constant and invariable" (*a*). This species of insurance is not, strictly speaking, a contract of indemnity; but it has so many features in common with those contracts, that it is convenient to consider it along with them.

Contracts with de facto *directors.*—A person who effects a policy with a life insurance company in the ordinary course of business is not bound to inquire whether the persons signing the policy as directors have been legally appointed directors, or are empowered to use the seal of the company. It is sufficient if the policy appears on the face of it to be consistent with the articles of association of the company, and the Acts of parliament under which it is incorporated (*b*).

Of the interest of the insured.—By the 14 Geo. 3, c. 48, it is enacted (s. 1), that no insurance shall be made on the life of any person wherein the person for whose use or benefit, or on whose account, the policy shall be made, shall have no interest, by way of gaming or wagering (*ante*, pp. 677, 678); that it shall not be lawful to make any policy on life or lives without inserting therein the name of the person interested therein, or for whose use and benefit, and on whose account, the policy was made (*c*); and (s. 3) that, in all cases where the insured has an interest in such life or lives, no greater sum shall be recovered and received from the insurer than the amount or value of the interest of the insured in such life or lives; but nothing therein contained is (s. 4) to extend to

(*e*) *Simpson* v. *The Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L. J. Ch. 329.

(*a*) Parke, B., *Dalby* v. *Ind. & Lond. Ass. Co.*, 15 C. B. 387; 24 L. J. C. P. 6.

(*b*) *County Life Assurance Co., in re*, L. R. 5 Ch. 288.

(*c*) *Hodson* v. *Observ. Life Ass. Co.*, 8 Ell. & Bl. 40; 26 L. J. Q. B. 303; *Shilling* v. *Accid. Death Ins. Co.*, 2 H. & N. 42; 27 L. J. Ex. 16.

insurances on ships, goods, or merchandises. If an insurance company lends money at interest upon the terms that the borrower do insure his life in double the money lent, the policy executed in furtherance of this agreement is not a gaming or wagering policy within the meaning of the statute (*d*). The interest of the insured must be a pecuniary interest in the duration of the life insured (*e*); such as the interest which a creditor has in the life of his debtor (*f*), or a trustee in his trust moneys and revenues (*g*), or a wife in the life of her husband who is bound by law to support and maintain her (*h*), or the interest which a husband has in an annuity payable to his wife for life (*i*). By the Married Women's Property Act, 1870 (*k*), a married woman may effect a policy upon her own life or the life of her husband for her separate use; and a policy effected by the husband on his own life for the benefit of his wife or children will enure for the benefit of his wife for her separate use and of her children, and does not form part of his estate or that of his creditors (*l*). Where a creditor promised his debtor that he would not exact payment of the debt during his life, but there was no consideration or other circumstances to make the promise binding, the court held that the promise did not give the debtor an insurable interest in the life of the creditor (*m*). But a contract for employment at a fixed salary for a certain term gives the employed an insurable interest in the life of the employer (*n*). If one person has a present interest in the policy, though, after that present purpose is satisfied, another person may be the party interested, the name of both persons must be inserted in the policy (*o*). If the insured has an insurable interest in the duration of the life at the time he effects the policy, and his interest afterwards ceases, he is not thereby prevented from suing upon the policy to recover so much of the sum insured as his interest in the life extended to, at the time of the making of the policy. If, therefore, a creditor insures the life of his debtor for a certain sum, and the debt is paid, the creditor is not thereby deprived of his right of action upon the policy (*p*). But, though upon a life policy the insurable interest at the time of the making of the policy, and not the interest at the time of the death, is to be considered, the insured cannot recover from the insurers, whether upon one policy or many, more

(*d*) *Downes* v. *Green*, 12 M. & W. 490.

(*e*) *Halford* v. *Kymer*, 10 B. & C. 724.

(*f*) *Anderson* v. *Edie*, 2 Park. Ins. 914.

(*g*) *Tidswell* v. *Ankerstein*, Peake, 204.

(*h*) *Reed* v. *R. Ex. Ass. Co.*, 2 Peake, 70.

(*i*) *Henson* v. *Blackwell*, 4 Hare, 434.

(*k*) 33 & 34 Vict. c. 93, s. 10.

(*l*) See *Holt* v. *Everall*, 2 Ch. D. 266; *In re Mellor's Policy Trusts*, 6 Ch. D. 127; 7 Ch. D. 200.

(*m*) *Hebdon* v. *West*, 3 B. & S. 579; 32 L. J. Q. B. 85.

(*n*) *Hebdon* v. *West*, *supra*.

(*o*) *Evans* v. *Bignold*, L. R. 4 Q. B. 622.

(*p*) *Dalby* v. *Ind. & Lond. Life Ass. Co.*, 24 L. J. C. P. 3; 15 C. B. 365, overruling *Godsall* v. *Boldero*; *Law* v. *Lond. Indisp.* 24 L. J. Ch. 196.

than the insurable interest which the person making the insurance had at the time he insured the life. If for greater security he thinks fit to insure with many persons, and by different contracts of insurance, and to pay the premiums upon each policy, he is at liberty to do so; but he can only recover or receive upon the whole the amount of his insurable interest. If, therefore, he has received the whole amount from one insurer, he is precluded from recovering any more from the others (*q*). If the underwriter becomes bankrupt before the death has taken place and the amount insured has become payable, the interest of the insured in the policy may be valued and proved under the bankruptcy against such bankrupt underwriter (*r*).

Warranties—Conditions.—A statement respecting the life insured does not amount to a warranty unless it is made the basis of the contract, and was intended by the parties to have that effect (*s*); but policies are generally granted subject to the condition that, if any untrue statement is contained in any of the documents addressed to the insurers in relation to the life insured, the policy shall be void (*t*). By untrue statement is sometimes meant a statement that is wilfully and designedly untrue (*u*). In other cases the policy will be void if the statement is unintentionally untrue (*x*), and is material (*y*). When there is a warranty that the person whose life is to be insured is in good health, it means that he is in a reasonably good state of health, not that he is perfectly free from illness. If there is a warranty that the party is "free from any disorder tending to shorten life," it does not mean that he has no disease at all; and it is not to be concluded that a disorder with which a person is afflicted at the time the insurance is effected is a disorder tending to shorten life, merely because he afterwards dies of it (*z*). A warranty that the party whose life is insured "has not been afflicted with, nor is subject to, vertigo, fits, &c.," does not mean that the party has never had a fit in his life, but that he is not at the time the insurance is made a person habitually or constitutionally afflicted with fits (*a*). If the insured, or his broker, or the agent effecting the policy, merely says that he believes the life to be a good one, but will not warrant, the

(*q*) *Hebden* v. *West*, *ante*, p. 740.

(*r*) *Cox* v. *Liotard*, 1 Doug. 166, n.

(*s*) *Wheelton* v. *Hardisty*, 8 Ell. & Bl. 302; 26 L. J. Q. B. 265; 27 *ib.* 241.

(*t*) *Cazenove* v. *Brit. Eq. Ass. Co.*, 28 L. J. C. P. 259; 29 *ib.* 160.

(*u*) *Fowkes* v. *Manch., &c., Ins. A.*, 3 B. & S. 917; 32 L. J. Q. B. 153; *Perrins* v. *Marine & Gen. Ins. Co.*, 2 Ell. & Ell. 317; 27 L. J. Q. B. 242; *Sweeny* v. *Promoter Life Ass. Co.*, 14 Ir. C. L. R. 487.

(*x*) *Macdonald* v. *Law Union Ins. Co.*, L. R. 9 Q. B. 328.

(*y*) *London Ass. Co.* v. *Mansel*, 11 Ch. D. 363.

(*z*) *Willis* v. *Poole*, 2 Park. Ins. 935; *Watson* v. *Mainwaring*, 4 Taunt. 763; *Areson* v. *Ld. Kinnaird*, 6 East, 188.

(*a*) *Chattock* v. *Shawe*, 1 Mood. & Rob. 498

underwriter will be liable, unless he can show that the party so stating his belief knew that the life was not good (*b*).

Fraudulent misrepresentation and fraudulent concealment of circumstances material to be known to the underwriter naturally avoid life policies in common with all other contracts, the materiality of the misstatement or concealment being a question for the jury (*c*). Some policies, however, make the insurance company itself sole judge of the materiality or immateriality of the falsehood, and adopt the most stringent provisions against misstatement, whether material or immaterial, known or not known to be untrue by the party making them, so that, observes Lord St. Leonards, in a recent case, "I am bound to say, unless they are fully explained to the parties, a vast number of persons will be led to suppose that they have made a provision for their families by an insurance on their lives, when, in point of fact, the policy is not worth the paper on which it is written" (*d*). False answers given to verbal inquiries as to whether the life sought to be insured had been previously insured at other offices have been held to be fraudulent misrepresentations avoiding the policy (*e*); and so have false answers respecting spitting of blood, consumptive symptoms, &c., or concerning the general health and state and condition of the life insured (*f*). If the insurer is referred for information to a former medical attendant of the life insured, and not to the immediate and usual medical attendant, such an omission to refer to the proper person will vacate the policy.

Principal and agent.—If an untrue statement, or a concealment of a fact, or non-communication of a material circumstance, takes place through the instrumentality of an agent, the insured, who is to benefit by the policy, is bound by it, though he himself is not privy to the falsehood of the representation, or the non-communication of the material fact. But, where a party effects a policy on the life of another, the person whose life is insured is not the general agent of the person procuring the insurance, so as to make his false representations the false representations of the party procuring the insurance; and the same may be said of false representations of medical attendants and referees, unless these representations are expressly made the basis of the policy, or the parties making them are themselves the persons negotiating the contract. There is no analogy between the statements "of the

(*b*) *Stackpole* v. *Simon*, 2 Parke, Ins. 932.

(*c*) *Lindenau* v. *Desborough*, 8 B. & C. 586; *Jones* v. *Provinc. Ins. Co.*, 3 C. B. N. S. 86.

(*d*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 507; *Towle* v. *The National Guardian Ass. Soc.*, 3 Giff. 42; 30 L. J. Ch. 900.

(*e*) *Wainwright* v. *Bland*, 1 M. & W. 32.

(*f*) *Geach* v. *Ingall*, 14 M. & W. 95.

life" or the referees in the negotiation of a life insurance and the statements of an insurance broker to underwriters, by which he induces them to subscribe the policy (*g*). But policies may be framed making the insured responsible for any material misrepresentation or concealment by the "life" or the referees.

Indisputable policies.—Many insurance companies issue prospectuses and transact their business on the terms that all policies effected by them shall be unquestionable or indisputable, unless obtained by fraud (*h*).

Of the risks covered by the policies.—"When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risks, unless there was some fraud in the person insuring, either by his suppressing circumstances which he knew, or alleging what was false" (*i*). Where, therefore, there is no express provision in the policy that in the event of the insured dying by his own hand the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity (*k*). But, if a man insures his own life for a certain sum to be paid to his executors after his decease, in consideration of annual premiums to be paid by him to an insurance company, the policy will be void, and the amount irrecoverable, if he is killed in a duel, or feloniously destroys himself, or dies by the hand of the common hangman or public executioner (*l*). In most policies, where parties insure their own lives, a condition is inserted making void the policy in case the party shall die by his own hands, or by the hands of justice, or in consequence of a duel; and it has been held that such a condition is not limited to felonious self-destruction, but extends to all cases of voluntary self-destruction, so that, if a man destroys himself in a fit of phrenzy or delirium, the insurers will be discharged from liability (*m*). Such policies sometimes contain an exception to the effect that the policy in such a case shall not be void to the extent of any *bonâ fide* interest therein which at the time of such death shall be vested in any other person for a sufficient pecuniary or other consideration; and, where the insurance company with whom the policy was effected had advanced money to the insured upon mortgage and upon the deposit of the policy as a collateral security, it was held that they

(*g*) *Wheelton* v. *Hardisty*, 8 Ell. & Bl. 232, 285; 27 L. J. Q. B. 241.

(*h*) *Wood* v. *Dwarris*, 11 Exch. 493; *Wheelton* v. *Hardisty*, 8 Ell. & Bl. 264.

(*i*) *Ross* v. *Bradshaw*, 2 Park. Ins. 934.

(*k*) *Horn* v. *Anglo-Austra. Ass. Co.*, 30 L. J. Ch. 511.

(*l*) *Amicable Society* v. *Bolland*, 4 Bligh, N. S. 194.

(*m*) *Clift* v. *Schwabe*, 3 C. B. 476; 17 L. J. C. P. 2; *Dormay* v. *Borradaile*, 16 ib. C. P. 337; 5 C. B. 380; *Moore* v. *Woolsey*, 24 L. J. Q. B. 40; *Dufaur* v. *Profess. Life Co.*, 27 L. J. Ch. 817.

had such a *bonâ fide* interest, and that the policy was not void upon the suicide of the insured (*n*).

If the life is insured for one year from the day of the date of the policy, and the death occurs that very day twelvemonth, the insurer will be liable; for "from the day of the date excludes the day" (*o*). But the word "from" may mean either inclusive or exclusive, according to the apparent intention of the parties, to be gathered from the general context of the written instrument (*p*).

Forfeiture of policies—Non-payment of premium—Days of grace.—Whenever the policy is to become forfeited if the premium is not paid by a given day, but the policy may nevertheless be revived on payment of the premium within a certain extended period of time, it has been held to be essential to the revival of the policy that the life insured is in being at the time of the payment and acceptance of the premium (*q*). Where the policy was to continue provided *the insured* paid the premium within twenty-one days after it became due, and the premium became due and was not paid, and the insured died within the twenty-one days, it was held that the premium could not be paid and the policy kept on foot by his executors (*r*). Many policies, however, expressly provide that in case any person on whose life any insurance shall have been effected shall happen to die after the premium has become due, but before payment, the insurance shall nevertheless be valid, provided the premium is paid within the days of grace (*s*). The debiting by the insurer of the agent of the insured with the premium is not a payment to the insurer by the insured (*t*). A claim under a winding-up in respect of a policy of life insurance is not affected by non-payment of the premium where the days of grace have not expired until after the commencement of the winding-up (*u*).

Non-inception of the risk—Return of premium.—When the policy is rendered null and void by reason of a misstatement made by the insured by mistake, and without fraud, and the risk has never attached, the premium is, as we have already seen in the case of marine insurance (*ante*, p. 728), recoverable; but, if the policy is avoided by reason of the fraud or deceit of the insured or his agent, the premiums cannot then be recovered back (*x*). The policies of most insurance companies now provide, not only that

(*n*) *White* v. *The British Empire Mutual Life Ass. Co.*, L. R. 7 Eq. 394.

(*o*) *Howard's case*, 2 Salk. 625.

(*p*) *Pugh* v. *Duke of Leeds*, 2 Cowp. 714.

(*q*) *Pritchard* v. *Merch. Life Ass. Co.*, 3 C. B. N. S. 642; 27 L. J. C. P. 169.

(*r*) *Simpson* v. *Accid. Death Ins. Co.*, 2 C. B. N. S. 295; *Want* v. *Blunt*, 12 East, 183; *Tarleton* v. *Staniforth*, 5 T. R. 695.

(*s*) *Prince of Wales Life Ass. Co.* v. *Harding*, 27 L. J. Q. B. 301; El. Bl. & El. 183.

(*t*) *Acey* v. *Fernie*, 7 M. & W. 151.

(*u*) *In re Albert Ass. Co., Cook's Policy*, L. R. 9 Eq. 703.

(*x*) *Duffell* v. *Wilson*, 1 Campb. 401.

the contract shall be void if there is any false statement or misrepresentation on the part of the insured of any material circumstance, but that all the premiums that may have been paid upon the policy shall be forfeited to the insurer, so that the policy may be avoided, and the premiums forfeited, by an innocent and unintentional misstatement (*y*). But Lord St. Leonards draws a distinction between that portion of the proviso which is framed as a protection to the insurer by making his liability for the payment of the amount insured dependent upon a true and accurate statement of every material circumstance, and the penal part of the proviso working a forfeiture of the premiums, and intimates that such a construction should be adopted as will afford a fair security to the insurer from misrepresentation and misstatement, on the one hand, and a just protection to the insured against the forfeiture, on the other, where there has been no wilful misstatement, or misconduct, on his part (*z*).

Waiver of forfeiture.—If, after the policy has been forfeited by non-observance of a condition annexed to it, the insurers or their agent continue to receive the premiums with full knowledge of the breach of the condition, they will be deemed to have waived the forfeiture, and will not afterwards be permitted to avoid the policy (*a*).

Assignment of life policies.—Policies of life insurance, being *choses in action*, could not formerly be assigned, so as to give the assignee a right to maintain an action upon them in his own name. But the assignment vested the equitable interest in the contract in the assignee, and entitled the latter to sue upon the policy, in the name of the party who was clothed with the legal interest, and who had the right of action thereon at common law (*b*).

Now, however, by the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144), any person or corporation now being or hereafter becoming entitled, by assignment, or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and give an effectual discharge for the monies thereby assured, may sue at law in the name of such person or corporation to recover such monies. By sect. 3, no assignment made after the passing of the Act is to confer on the assignee any right to sue, until a written notice of the date and purport of the assignment has been given to the assurance company

(*y*) *Duckett* v. *Williams*, 2 C. R. & M. 348.

(*z*) *Anderson* v. *Fitzgerald*, 4 H. L. C. 484; *Jones* v. *Provinc. Ins. Co.*, 3 C. B. N. S. 65; 26 L. J. C. P. 272; *Cazenove* v. *Brit. Eq.*, 5 Jur. N. S. 1309; 29 L. J. C. P. 160.

(*a*) *Wing* v. *Harvey*, 23 L. J. Ch. 511; *Armstrong* v. *Turquand*, 9 Ir. Com. Law Rep. 32.

(*b*) *Ashley* v. *Ashley*, 3 Sim. 151. See now, as to assignment of a *Chose in action*, Jud. Act, 1873, s. 25 (*b*), *post*, p. 1269.

at their principal place of business, which is to be specified in the policy (sect. 4); and the date on which the notice is received is to regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any assurance company before the date on which the notice is received is to be as valid as if the Act had not been passed. By sect. 5, the assignment may be made either by indorsement on the policy or by a separate instrument in the form given in the Act. By sect. 6, every assurance company to whom notice of assignment shall have been given are, at the request in writing of the person giving the notice, and upon payment of a fee not exceeding five shillings, to deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and such acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company, will be conclusive evidence as against the company of their having duly received the notice to which the acknowledgment relates. By sect. 7, the expression "policy of life assurance" or "policy" is to mean an instrument by which the payment of monies, by or out of the funds of an assurance company, on the happening of any contingency depending on the duration of human life, is assured or secured; and the expression "assurance company" is to mean and include every corporation, association, society, or company carrying on the business of assuring lives or survivorships, either alone or in conjunction with any other object. By sect. 8, the Act is not to apply to any policy of assurance granted or to be granted, or to any contract for a payment on death entered into, in pursuance of the provisions of the 16 & 17 Vict. c. 45, or the 27 & 28 Vict. c. 43, or to any engagement for payment on death by any friendly society (*bb*).

Notice of the assignment should be given to the insurance company, for the purpose of securing a right to sue in the name of the assignee (*c*). An assignment of a life policy to secure a debt, with proviso for redemption, is an assignment by way of mortgage, and requires an *ad valorem* stamp as such (*d*).

Where a policy is to be void in case of suicide, unless it has been legally assigned, any circumstances constituting a valid, equitable assignment of the policy will satisfy the proviso (*e*); but an assignment by operation of law, such as an assignment by force

(*bb*) These two statutes are partially repealed by 45 & 46 Vict. c. 51.

(*c*) *Post*, p. 1271; *Williams* v. *Thorp*, 2 Sim. 257; *Ex parte Colvill*, 1 Mont. 110; *Ex parte Tennyson*, 1 Mont. & Bl. 67; *Thompson* v. *Tomkins*, 2 Drew. & Sm. 8; *Webb, in re*, 36 L. J. Ch. 341.

(*d*) *Caldwell* v. *Dawson*, 5 Exch. 6.

(*e*) *Jones* v. *Consol. Ins. Co.*, 28 L. J. Ch. 66; 26 Beav. 256; *White* v. *The British Ass. Co.*, *ante*, p. 744.

of the Bankrupt Acts, is not within the proviso, and will not keep the policy on foot for the benefit of creditors (*f*).

Right of the party interested in the policy to recover the insurance money.—The liability upon a life policy is not affected by the question whether the party claiming the benefit of the policy has, or has not, been damnified by the happening of the contingency upon which the money becomes payable. Thus, if a creditor insures the life of his debtor to the extent of the debt, and after the death of the debtor the executors of the debtor pay the debt to the creditor, the latter may nevertheless recover upon the policy the amount insured by him upon the life of such debtor (*g*).

Appropriation of the funds of life insurance companies.—By the 33 & 34 Vict. c. 61, s. 4, it is enacted that, "in the case of a company established after the passing of this Act transacting other business besides that of life assurance, a separate account shall be kept of all receipts in respect of the life assurance and annuity contracts of the company, and the said receipts shall be carried to and form a separate fund, to be called the life assurance fund of the company, and such fund shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance (*h*); and, in respect to all existing companies, the exemption of the life assurance fund from liability for other obligations than to its life policy-holders shall have reference only to the contracts entered into after the passing of this Act, unless by the constitution of the company such exemption already exists; provided always that this section shall not apply to any contracts made by any existing company by the terms of whose deed of settlement the whole of the profits of all the business are paid exclusively to the life policy-holders, and on the face of which contracts the liability of the assured distinctly appears."

Winding-up of insurance companies.—By sect. 21, "the court may order the winding-up of any company in accordance with the Companies Act, 1862, on the application of one or more policy-

(*f*) *Jackson* v. *Forster*, 1 Ell. & Ell. 463; 29 L. J. Q. B. 8; *Moore* v. *Woolsey*, 4 Ell. & Bl. 255; 24 L. J. Q. B. 40.

(*g*) *Dalby* v. *Ind. & Lond. Life Ass. Co.*, 15 C. B. 390; 24 L. J. C. P. 8, overruling *Godsall* v. *Boldero*, 9 East, 72; De Morgan on Probabilities, p. 244, cited *ib.* 393-397; *Law* v. *Lond. Indis. Ass. Co.*, 24 L. J. Ch. 196; *ante*, p. 740.

(*h*) By the 35 & 36 Vict. c. 41. s. 2, the foregoing part of the section is to apply to every company established before the passing of the 33 & 34 Vict. c. 61; but neither this nor that Act is to diminish the liability of the life assurance fund for any contracts entered into before the passing of the 33 & 34 Vict. c. 61.

holders or shareholders, upon its being proved to the satisfaction of the court that the company is insolvent" (*i*).

By sect. 22, "the court, in the case of a company which has been proved to be insolvent, may, if it thinks fit, reduce the amount of the contracts of the company upon such terms and subject to such conditions as the court thinks just, in place of making a winding-up order" (*ii*).

Under the articles of association of an insurance company it was held that the policy-holders, who participated in the profits to some degree, were members, and liable to be put on the list of contributories upon the winding-up of the company (*k*), but that they were not to be called on to contribute until the shareholders were exhausted (*l*). The Court has jurisdiction to wind up an unregistered mutual insurance society; but it seems that the holders of policies in such a society are not liable to contribute to the payment of debts, and the funds of the society are distributable among them in proportion to their claims (*m*).

Novations by policy-holders.—By the 35 & 36 Vict. c. 41, s. 7, it is provided that "where a company, either before or after the passing of this Act, has transferred its business to or been amalgamated with another company, no policy-holder in the first-mentioned company who shall pay to the other company the premiums accruing due in respect of his policy shall by reason of any such payment made after the passing of this Act, or by reason of any other act done after the passing of this Act, be deemed to have abandoned any claim which he would have had against the first-mentioned company on due payment of premiums to such company, or to have accepted in lieu thereof the liability of the other company, unless such abandonment and acceptance have been signified by some writing signed by him or by his agent lawfully authorized."

Insurance against injury by accident.—Where an insurance company granted policies of insurance against loss of life and personal injuries arising from "accidents at sea," it was held that death by sunstroke was not an "accident" within the meaning of the policy, and that death engendered by exposure to heat, cold, damp, and atmospheric influences, could not properly be said to be accidental (*n*); but death by drowning is a case of death by

(*i*) And see the 35 & 36 Vict. c. 41, s. 4, as to the winding-up of a subsidiary company. The mode of valuing the policies in the case of a winding-up is provided for by sect. 5 of the same Act.

(*ii*) See *In re Gt. Britain Ass. Soc.*, 20 Ch. D. 351.

(*k*) *Winstone's case*, 12 Ch. D. 239; but not a policy holder who has assigned his policy: *Brown's case*, 18 Ch. D. 639. As to the liability of the assignee, see *Sanders' case*, 20 Ch. D. 403.

(*l*) *In re Albion Life Ass. Soc.*, 16 Ch. D. 83.

(*m*) *In re Great Britain Ass. Soc.*, 16 Ch. D. 246.

(*n*) *Sinclair* v. *Maritime Pass. Ass. Co.*, 30 L. J. Q. B. 77.

"accident" within the meaning of such a policy (*o*). Where a policy for insuring the payment of money in case the insured should be injured by accidental violence, and die from the direct effect of such accidental injury, expressly excepts death or disability from any disease or cause arising within the system of the insured before, or at the time of, or following such accidental injury, death from disease within the system, which disease has been caused by accidental violence, is not within the exception (*p*). In consequence of the above case, the clause contained in the policies of the company was varied, and the policy does not now insure against "death from rheumatism, gout, hernia, erysipelas, or any other disease or secondary cause or causes arising within the system of the insured before, or at the time of, or following such accidental injury (whether causing such death directly or jointly with such accidental injury)." Where erysipelas supervened upon, and in consequence of, an accidental cut, and the assured died of the erysipelas seven days after the accident, it was held that the insurers were protected by the above condition, and were not liable (*q*).

Railway accidents.—Damages.—Where a passenger by railway effected an insurance for 1,000*l.* with a company, to be paid to his personal representatives in the event of his death by a railway accident, and a proportionate part of the 1,000*l.* to be paid to the insured himself in case of any personal injury by reason of such accident, it was held that the damages recoverable in respect of personal injury to the insured, not attended with loss of life, were confined to compensation for bodily pain and suffering and the expenses of medical and surgical attendance, &c., and that loss of time or loss of profits resulting from the accident could not be taken into consideration by the jury; "otherwise one passenger, whose time is more valuable than another's, would, for precisely the same personal injury, receive a larger remuneration than another whose time would be of less value" (*r*).

Breach of covenants to insure.—Where a covenant was entered into with an insurance company to keep up a policy in their office as security for money lent by them, and the policy was dropped, and the company recovered judgment for the amount of the loan, with interest thereon, it was held that the measure of damages was not the amount of the premiums which would have been payable to the company if the policy had been kept up, but the

(*o*) *Trew* v. *Rail. Pass. Ass. Co.*, 6 H. & N. 839; 30 L. J. Ex. 317; *Winspear* v. *Accident Ins. Co.*, 6 Q. B. D. 42; *Lawrence* v. *Accident Ins. Co.*, 7 Q. B. D. 216.

(*p*) *Fitton* v. *Accidental Death Ins. Co.*, 17 C. B. N. S. 122; 34 L. J. C. P. 29.

(*q*) *Smith* v. *The Accident Ins. Co.*, L. R. 5 Ex. 302.

(*r*) *Theobald* v. *Railway Passengers' Ass. Co.*, 23 L. J. Ex. 249.

amount of injury sustained, either through loss of the security, or through the expenses incurred in effecting another insurance (s). Where a deed by which a debtor assigned a policy of insurance on his life for 1,000*l.* to trustees for his creditors, contained a covenant that he would not do any act or thing by which the policy should be forfeited, and the policy was subject to a condition that, if the insured should go beyond the limits of Europe without license from the directors, the policy should be void, and the debtor went beyond the limits of Europe without license from the directors, it was held that the measure of damages was the present value of the policy to be assessed by an actuary, taking into consideration the fact that the debtor had covenanted to pay, and would have to pay, the premiums on the policy (*t*).

(s) *Nat. Ass. Co.* v. *Best*, 27 L. J. Ex. 19; *Brown* v. *Price*, 4 C. B. N. S. 598.

(*t*) *Hawkins* v. *Coulthurst*, 5 B. & S. 343; 33 L. J. Q. B. 192.

CHAPTER V.

MERCANTILE INSTRUMENTS.

[*** *Throughout this Chapter, the reader must refer to the Bills of Exchange Act, 1882, which is printed in the Appendix to this volume.*]

SECTION I.

BILLS, NOTES, AND CHEQUES.

Negotiable instruments.—When an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide* transferee for value, though the transfer may not have taken place in market overt. But if either of the above requisites is wanting, that is, if it is either not accustomably transferable, or, though it be accustomably transferable, yet if its nature is such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property in it to a vendee however *bonâ fide*, if the transferor himself has not a good title to it, and the transfer is made out of market overt (*a*). Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract; and if he is a *bonâ fide* holder for value, he has a good title, notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it (*aa*).

Bills of exchange.—Any absolute, unconditional order (*b*) in

(*a*) *Miller* v. *Race*, 1 Smith, L. C. 7th ed., p. 539.

(*aa*) See now Bills of Exchange Act in Appendix, s. 29, "Holder in due course."

(*b*) If the order is for the payment of money on a contingency, the instrument is not negotiable: *Alexander* v. *Thomas*, 16 Q. B. 333; 20 L. J. Q. B. 207; *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374; 42 L. J. Q. B. 183. As to limitations of liability endorsed on the face of the bill, see *Meredith, Ex parte*, 32 L. J. Ch. 302.

writing from one man to another, duly stamped, directing the drawee, or person to whom the order is addressed, to pay a sum of money to the drawer or to his "order," or to some third party or to the order of such third party, is a bill of exchange, transferable by the payee, so as to enable the transferee to sue in his own name upon such bill, provided the assignment has been made by the payee in conformity with mercantile custom, as settled and established by law (*c*). In order to constitute a bill of exchange it is essential that there should be a drawer, a drawee, and a payee; and, though the payee may be described in any way, yet, in order that the bill should be valid, the payee must be named or otherwise indicated with reasonable certainty (*d*). Although a bill of exchange drawn and accepted by the same party may be in strictness a promissory note, yet where the intention to give and receive such a document as a bill capable of being negotiated as such is clear, both the holder and the party may treat it accordingly (*e*).

Transfer of bills of exchange.—If the written order duly stamped is made payable to "bearer," it is transferable by mere delivery (*f*); so that any *bonâ fide* holder or bearer of the instrument is entitled to maintain an action upon it in his own name as soon as it becomes payable. If, on the other hand, it is drawn "payable to order," it can only be assigned by indorsement from the payee (*g*). The indorsement may be written either on the back or the face of the bill (*h*), and is sometimes an indorsement in full, so called, because the indorser not only writes his own name on the bill, but expresses therein in whose favour the indorsement is made, as "pay the contents to Mr. A. B.," and sometimes an indorsement in blank, when the name of the indorser himself alone appears upon the instrument, no mention being made of the indorsee. In the first case the indorsee can only transfer his interest in the bill by his own indorsement in writing; but, in the second, he can transfer it by delivery only, so that any subsequent *bonâ fide* holder may treat the first indorsement in blank as a direct indorsement to himself, and bring an action in his own name upon the instrument; and this he might formerly do notwithstanding subsequent indorse-

(*c*) *Ellison* v. *Collingridge*, 9 C. B. 570; 19 L. J. C. P. 268; *Lloyd* v. *Oliver*, 21 *ib.* Q. B. 307; *Peto* v. *Reynolds*, 9 Exch. 410.

(*d*) See sect. 7 of Bills of Exchange Act in Appendix, over-riding *Yates* v. *Nash*, 29 L. J. C. P. 306; 8 C. B. N. S. 581; *M'Call* v. *Taylor*, 34 L. J. C. P. 365; 19 C. B. N. S. 301.

(*e*) *Willans* v. *Ayers*, 3 Ap. Cas. 133. See now Bills of Exchange Act in Appendix, sect. 5.

(*f*) *Gibson* v. *Minet*, 1 H. Bl. 606.

(*g*) *Edge* v. *Bumford*, 31 Beav. 247. See Bills of Exchange Act in Appendix, sect. 31.

(*h*) *Young* v. *Glover*, 3 Jur. N. S. 637.

ments in full had been made thereon (*i*); but this appears to have been altered (*ii*). Any number of persons, too, whether partners or not, may, it seems, join in suing upon a bill indorsed in blank (*k*).

The bill may be indorsed before the day that it bears date (*l*) and before acceptance, and whilst the date and the amount for which it is drawn are left in blank (*m*); and the acceptance and indorsement may be made before the bill is drawn; and a bill drawn and issued in blank for the name of the payee may, under certain circumstances, be filled up by a *bonâ fide* holder with his own name, and will bind the drawer (*n*). So it has been held that where a bill is accepted in blank, and is afterwards filled in with the name of a drawer and indorser by a forgery, still the acceptor is liable to a *bonâ fide* holder for value without notice of any irregularity (*o*). If the bill be made payable by the fraud of the acceptor to a fictitious payee, a *bonâ fide* holder may recover upon the instrument as a bill payable to bearer (*p*). If the indorsement is made before the bill has been filled up for any specific sum, the indorser may become liable to subsequent indorsees or holders to any amount warranted by the stamp. The indorsement is a letter of credit for an indefinite sum (*q*). If the payee of a bill or money order, not negotiable, indorses it, he is liable on his indorsement to his indorsee (*r*). The indorsee may treat the indorser as the drawer of a new bill, or as the indorser of the old bill; but he cannot treat him as both (*s*). Every indorser may be taken as the drawer of a fresh bill, inasmuch as he guarantees payment of the bill when at maturity by the acceptor (*t*).

"A bill of exchange is negotiable *ad infinitum*, until it has been paid by, or discharged on behalf of, the acceptor. If the drawer has paid the bill, he may sue the acceptor upon it; and, if, instead of suing the acceptor, he put the bill into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor" (*u*). But, when the bill has

(*i*) *Fairclough* v. *Pavia*, 9 Exch. 695; 23 L. J. Ex. 215; *Wookey* v. *Pole*, 4 B. & Ald. 9.

(*ii*) See Bills of Ex. Act in App. s. 8 (3).

(*k*) *Attwood* v. *Rattenbury*, 6 Moore, 579; *Ord* v. *Portal*, 3 Campb. 239; *Lowe* v. *Copestake*, 3 C. & P. 300.

(*l*) *Pasmore* v. *North*, 13 East, 517.

(*m*) *Snaith* v. *Mingay*, 1 M. & S. 87.

(*n*) *Schultz* v. *Astley*, 2 Bing. N. C. 544; 2 Sc. 815; *Crutchley* v. *Clarence*, 2 M. & S. 90; *Crutchley* v. *Mann*, 5 Taunt. 529.

(*o*) *London & S. W. Bank* v. *Wentworth*, 5 Ex. D. 96; and see *Hogarth* v. *Latham*, 3 Q. B. D. 643, *post*, p. 787; *contra*, where notice of irregularity.

(*p*) *Minet* v. *Gibson*, 3 T. R. 481; 1 H. Bl. 569; cited 1 Campb. 130. See now Bills of Ex. Act in App. ss. 7 & 20.

(*q*) *Russell* v. *Langstaffe*, 2 Doug. 515, *a.*; *Hatch* v. *Searles*, 2 Sm. & Giff. 152. See the Act in App. s. 20.

(*r*) *Hill* v. *Lewis*, 1 Salk. 132.

(*s*) *Burmester* v. *Hogarth*, 11 M. & W. 101.

(*t*) *Matthews* v. *Bloxsome*, 33 L. J. Q. B. 213; this case has been doubted, see *Steele* v. *M'Kinlay*, 5 Ap. Cas. 754; *Penny* v. *Innes*, 1 Cr. M. & R. 439.

(*u*) Lord Ellenborough, *Callow* v. *Lawrence*, 3 M. & S. 95; *Hubbard* v. *Jackson*, 4 Bing. 391. See the Act in App. ss. 36, 59.

been paid by the acceptor, or the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person can sue on it; no person remains liable on it. If put into circulation again, it becomes a new bill, payable at sight, and must have a fresh stamp. An accommodation bill, paid by the drawer at maturity, cannot, therefore, be re-issued and negotiated (*x*). A payment, however, before the bill becomes due "does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills and notes; for it would be impossible to know whether there had not been an anticipated payment of them" (*y*). If, therefore, the acceptor discounts the bill, he may re-issue it, and send it forth again into general circulation (*z*).

Restrictive indorsements.—The negotiability of the bill may be limited and restrained by the express terms of the indorsement. Hence there are restrictive, conditional, and qualified indorsements. (See sects. 33–35 of the Act in Appendix). If the payee, by special indorsement, made a conditional transfer of the bill before acceptance, the drawee who accepted afterwards was bound by the condition (*a*). If the indorsement is accompanied by a notification that "the within must be credited to A.," or a direction "to pay A. for my use," every indorsee and subsequent holder has notice of the direction, and holds the bill, or the money he receives upon it, as the trustee of the restraining party (*b*). But an indorsement, "Pay J. S., or order, value in account with H. C. D.," is not restrictive (*c*). Where a bill of exchange had been indorsed in blank, and rendered generally negotiable, its negotiability could not afterwards be restrained by subsequent restrictive indorsements; and the acceptor consequently must have paid the bill on presentment by the indorsee or holder; and if not paid the indorsers were liable upon the instrument (*d*). The amount to be recovered upon the bill cannot be split into separate sums by the indorsement, so as to subject the prior parties to a plurality of actions (*e*). And, if the bill be indorsed for part only of the amount, and the limitation do not appear upon the face of the indorsement, the indorsee may sue for the whole sum due upon the bill, and will be a trustee of the surplus for the indorser (*f*).

(*x*) *Lazarus* v. *Cowie*, 3 Q. B. 465. See the Act in App. s. 59.

(*y*) *Burbridge* v. *Manners*, 3 Campb. 193.

(*z*) *Attenborough* v. *Mackenzie*, 25 L. J. Ex. 244; *Morley* v. *Culverwell*, 7 M. & W. 182. See the Act in App. ss. 37, 59, 61.

(*a*) *Robertson* v. *Kensington*, 4 Taunt. 30, but this is not so now, see the Act in App. s. 33.

(*b*) *Lloyd* v. *Sigourney*, 5 Bing. 525; 3 M. & P. 239; *Sigourney* v. *Lloyd*, 8 B. & C. 622; s. 35 of the Act in App.

(*c*) *Buckley* v. *Jackson*, L. R. 3 Ex. 135.

(*d*) *Walker* v. *Macdonald*, 2 Exch. 527; 17 L. J. Ex. 377; but this appears to have been altered, see s. 8 (3) of the Act in App.

(*e*) *Hawkins* v. *Cardy*, 1 Ld. Raym. 360. See s. 32 of the Act.

(*f*) *Reid* v. *Furnival*, 1 C. & M. 538; *Ex parte Newton*, 16 Ch. D. 330.

Who is to be deemed a bonâ fide *holder by indorsement* (*ff*).—The first transfer, by indorsement, of a bill of exchange is not effected by the mere act of the payee's writing his name on the back of the bill. There must be, as against the acceptor, a handing of the bill over, and a delivery of it to the transferee or his agent, with intent to make the person to whom it is delivered the holder of the bill, and to pass the property in it to him; and, as between the indorser and the indorsee, there must be an additional element of an intent to stand in the ordinary relation of indorser, that is, to guarantee the payment if the acceptor makes default (*g*). There is no indorsement, if the holder merely writes on the bill a direction to pay it to another person, and the other person gets possession of the bill without the holder's consent. Nor is there any indorsement, as between the indorser and his immediate indorsee, though the holder gives that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to make him the transferee of the property in the bill (*h*), or with the intention only of making him indorsee and owner of the bill on the performance of certain terms and conditions (*i*). Where a testator wrote his name on the back of a bill payable to his order, and kept the bill in his possession, and his executrix after his death delivered the instrument to the plaintiffs without indorsing it, it was held that the writing of his name by the deceased, and the delivery by the executrix, would not together constitute an indorsement of the note, and that the party to whom it was delivered had consequently no right to sue upon it (*k*). If the indorsement is intended to constitute a testamentary gift, it must be authenticated as such (*l*).

But, if the party to whose order the bill is payable writes his name on the back of the bill, and hands it over to another, who delivers it to a third person for value, that is an indorsement from the holder to such third person, and constitutes the latter the absolute owner of the bill. Where the drawer of a bill wrote his name on the back of it, and delivered it to a party to get it discounted, and the latter pledged the bill with a pawnbroker, and appropriated the money he received on the deposit of the bill to his own use, it was held that there was a valid indorsement of the bill from the drawer to the pawnbroker (*m*). One who receives a bill of exchange (payable to order) unindorsed, acquires no better

(*ff*) See now who is an "holder in due course," s. 29 of the Act in App.

(*g*) *Denton* v. *Peters*, L. R. 5 Q. B. 475. See s. 21 of the Act in App.

(*h*) *Lloyd* v. *Howard*, 15 Q. B. 997; 20 L. J. Q. B. 1; *Attenborough* v. *Clark*, 27 L. J. Ex. 138.

(*i*) *Bell* v. *Lord Ingestre*, 12 Q. B. 317; 19 L. J. Q. B. 71; *Castrique* v. *Buttigieg*, 10 Moore, P. C. 109.

(*k*) *Bromage* v. *Lloyd*, 1 Exch. 35; 16 L. J. Ex. 257.

(*l*) *Mitchell* v. *Smith*, 33 L. J. Ch. 596.

(*m*) *Barber* v. *Richards*, 6 Exch. 63; 19 L. J. Ex. 135.

title under it than that which the person from whom he receives it had. Therefore, where A. had fraudulently obtained a bill from B. and handed it to C., in satisfaction of a *bonâ fide* debt, but without indorsing it, it was held that C. could not acquire a legal title to sue by obtaining A.'s indorsement after he had received notice of the fraud (*n*). But a transferee of an indorsed bill of exchange has all the rights of a holder for value, if it has been handed to him on account of a pre-existing debt, and is not affected by any infirmity of title in the transferor (*o*). When the drawer or party to whose order the bill is payable has written his name on the back of the bill, and handed the bill over in the ordinary course of transfer, it is afterwards transferable, as previously mentioned, from hand to hand, by mere delivery; and the consideration for each successive transfer cannot be inquired into, unless the bill has been stolen or obtained by misrepresentation or fraud. Any holder, therefore, who does not wish to sue in his own name on the bill may hand the bill over to another party, in order that the latter may sue upon it for him as his trustee (*p*). But the bill must be handed over prior to the commencement of the action; for, where the holder of a bill indorsed in blank, being unwilling to sue upon it himself, procured the plaintiff, who had no interest in the bill, to sue upon it, and handed the bill to the plaintiff after the commencement of the action, that the latter might produce it in court, it was held that the plaintiff was not entitled to recover upon it, as he was not the holder of the bill at the time he brought his action (*q*). If, however, the bill has been indorsed and delivered to some person professing to act as the plaintiff's agent, although without his knowledge, and the plaintiff adopts the acts of the assumed agent, that is sufficient to entitle him to recover, although the action has been commenced in the plaintiff's name without his knowledge, and before the adoption (*r*).

Intermediate infirmities of title.—A *bonâ fide* holder for value is not affected by an intermediate fraud or infirmity of title of which he had no knowledge or notice at the time he advanced his money on the credit and security of the bill of which he is the holder. Therefore, if a bill of exchange, indorsed generally, and handed over by a person competent to indorse it, is afterwards stolen, and the thief delivers it for value to a party who re[...]

(*n*) *Whistler* v. *Forster*, 14 C. B. N. S. 248; 32 L. J. C. P. 161. Sect. 31 (4) of the Act in App.

(*o*) *Belshaw* v. *Bush*, 11 C. B. 191; *Currie* v. *Misa*, L. R. 10 Ex. 153; 1 Ap. Cas. 554. Sect. 27 of the Act in App.

(*p*) *Oulds* v. *Harrison*, 10 Exch. 579; 24 L. J. Ex. 69; *Law* v. *Parnell*, 7 C. B. N. S. 282; 29 L. J. C. P. 17.

(*q*) *Emmett* v. *Tottenham*, 8 Exch. 884; 22 L. J. Ex. 281. See definition of holder in s. 2 of the Act.

(*r*) *Ancona* v. *Marks*, 7 H. & N. 686; 31 L. J. Ex. 163.

it without notice of the theft, the latter has full authority to negotiate the bill or sue upon it (s). Every person having possession of a bill of exchange has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer such bill, but with this limitation, that to make such transfer valid there must be a delivery, either by him or some subsequent holder of the bill, to some one who receives such bill *bonâ fide* and for value, and who is either himself the holder of it or a person through whom the holder claims (t).

When the holder is bound to prove that he gave value for the bill.—When a bill of exchange is made payable to order, and is indorsed generally by the drawer, the indorsement is, as we have seen, tantamount to an order to pay the bill to the bearer or holder, so that the mere production of such a bill by a party in possession of it is *primâ facie* evidence that he is a *bonâ fide* indorsee and holder of the bill; but this presumption of ownership and title arising from possession may be rebutted by proof that the bill had been lost by, or improperly obtained from, the owner (u), or that the acceptance is a forgery (x); and such evidence, if given, throws upon the holder the *onus* of proving that he gave value for the bill (see sect. 30 of the Act in Appendix). Wherever the bill is proved to have been illegal or fraudulent in its inception, or where the immediate indorser to the plaintiff is shown to have obtained possession of it by fraud, the plaintiff may be called upon for proof that he gave value for the bill, and took it without notice of the illegality or fraud; and, if such proof is not forthcoming, the plaintiff may be prevented from recovering upon the instrument (y). Where one partner has accepted a bill in fraud of the other partners, and has applied the proceeds therefrom to his own use, the holder must show that he gave value for the bill (z). But, if it is not distinctly proved that the note is tainted with illegality or fraud, the holder cannot be called upon to show that he gave value for the bill (a). Notwithstanding the general rule, that the *onus* is on the maker of a negotiable instrument to show that it has been paid, the holder is bound in the first place (unless he is a derivative indorsee for value during

(s) *Peacock* v. *Rhodes*, 2 Doug. 634; *Raphael* v. *Bank of England*, 17 C. B. 173; 25 L. J. C. P. 33.

(t) Alderson, B., *Marston* v. *Allen*, 8 M. & W. 494; 11 L. J. Ex. 126; *Watson* v. *Russell*, 3 B. & S. 34; 31 L. J. Q. B. 304. See s. 29 & 38 of the Act.

(u) *Bulkeley* v. *Butler*, 2 B. & C. 446.

(x) *Mather* v. *Ld. Maidstone*, 26 L. J. C. P. 58; 1 C. B. N. S. 273.

(y) *Hall* v. *Featherstone*, 3 H. & N. 284; 27 L. J. Ex. 308; *Mather* v. *Ld. Maidstone*, 1 C. B. N. S. 273; 26 L. J. C. P. 58; *Smith* v. *Braine*, 16 Q. B. 244; 20 L. J. Q. B. 201; *Berry* v. *Alderman*, 14 C. B. 95; 23 L. J. C. P. 34; *Harvey* v. *Towers*, 6 Exch. 656; 20 L. J. Ex. 318; *Paterson* v. *Hardacre*, 4 Taunt. 114.

(z) *Hogg* v. *Skeen*, 18 C. B. N. S. 426; 34 L. J. C. P. 153; overruling *Musgrave* v. *Drake*, 5 Q. B. 186.

(a) *Fitch* v. *Jones*, 5 Ell. & Bl. 245; 24 L. J. Q. B. 293.

the currency of the bill or note) to show that the maker received value for it (*b*).

Fraudulent transfers and indorsements.—If the acceptance or indorsement has been fraudulently made, and the plaintiff is a party to the fraud, or takes the bill with full knowledge of the fraud and of the infirmity of the title of his assignor, he cannot sue upon the bill, although he has given full value for it; but an innocent indorsee, who has received the bill, and given value for it, without notice of the fraud, may, it seems, transfer his title and right of action to a person who has knowledge of the original fraud, but is no party thereto. The latter may purchase the title and interest of the innocent indorsee, and so obtain a right of action upon the instrument (*c*). If a person holds the bill for a specific purpose, as for the benefit of the drawer or acceptor, and indorses the bill over in breach of the trust reposed in him, the indorsee cannot, if he has notice of the trust at the time of the indorsement, acquire any better right or title to the bill than the indorser had; for by taking the bill under such circumstances he makes himself a party to a fraud (*d*). If the holder is a mere agent, he will be affected with the infirmity of the title of his principal, and cannot have a better right upon the bill than his principal has (*e*). If a bill obtained by fraud is handed over, without indorsement, to an innocent holder for value, and the indorsement is not made until after the holder becomes cognizant of the fraud, he cannot sue upon the bill (*f*). If the party at the time of signing the bill is, without negligence on his part, misled as to the nature and contents of the document which he is signing, his signature will be of no force; for his mind does not go with the signature, and it is in the view of the law no signature at all, and a *bonâ fide* holder for value cannot recover against a person who has signed under such circumstances (*g*).

Accommodation bills.—Where the bill has been accepted for the accommodation of the drawer without any consideration or value for the acceptance, and that was known to the indorsee at the time he took the bill, and the indorsee paid only part of the amount for which the bill was drawn, he can only recover the sum he actually paid for the bill (*h*). So, if part of the money due on the bill has been paid by the drawer, the holder can only recover the balance from the acceptor (*i*).

Indorsement of bills overdue.—Whenever the bill is due at

(*b*) *Dettmar* v. *Metropolitan & Provincial Bank*, 1 H. & M. 641.

(*c*) *May* v. *Chapman*, 16 M. & W. 360. Sect. 29 of the Act in App.

(*d*) *Evans* v. *Kymer*, 1 B. & Ad. 528.

(*e*) *Solomons* v. *Bk. of Eng.* 13 East, 136.

(*f*) *Whistler* v. *Forster*, 14 C. B. N. S. 255; 32 L. J. C. P. 161.

(*g*) *Foster* v. *Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310.

(*h*) *Wiffen* v. *Roberts*, 1 Esp. 259. See s. 28 of the Act.

(*i*) *Cook* v. *Lister*, 13 C. B. N. S. 543; 32 L. J. C. P. 121.

the time of the indorsement, "it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the infirmities with which it may be incumbered in his hands" (*k*), such as the payment or satisfaction of the bill itself to the prior holder (*kk*). But the indorsee does not take it subject to claims arising out of collateral matters, such as the statutory right of set-off, which is merely a mode of preventing multiplicity of actions between the same parties (*l*). An original absence of consideration, the acceptance being an accommodation acceptance, will not defeat the claim of an indorsee for value of an overdue bill, unless there was an express or implied agreement restraining the negotiation of the bill after it should become due (*m*). Is was held in one case that even if there was an agreement that the bill should not be negotiated after it was due, this would not affect a *bonâ fide* indorsee for value, who took the overdue bill without notice of the agreement (*n*). If, pending an action on a bill of exchange, the bill is transferred to an indorsee, with notice, who brings a second action on the bill, that may be ground for the equitable interference of the court; but does not take away the negotiability of the instrument (*o*).

Presentment for acceptance.—The holder of an unaccepted bill should present it for acceptance without delay, in order that he may obtain the security of the acceptor. If acceptance is refused, the antecedent parties become liable immediately. Twenty-four hours at least ought to be allowed to the drawee to determine whether he will accept or not, if he requires time for consideration; but, if he avows his determination not to accept, the holder may forthwith proceed against the antecedent parties; and, if the acceptor clogs his acceptance with conditions and qualifications, the holder may treat his qualified acceptance as a refusal to accept, and give notice of dishonour (*oo*). If he accepts the qualified acceptance, he must give notice of the nature of the acceptance to the prior parties (*p*). When the bill is payable a certain number of days after sight, it is to be accounted so many days after the bill shall be accepted or protested for non-acceptance (*q*). The days are reckoned exclusively of the day on

(*k*) *Crossley* v. *Ham*, 13 East, 503; *Burrough* v. *Moss*, 10 B. & C. 558; *Lloyd* v. *Howard*, 15 Q. B. 998; *Holmes* v. *Kidd*, 3 H. & N. 891; 28 L. J. Ex. 112; *Goggerly* v. *Cuthbert*, 2 B. & P. N. R. 170.

(*kk*) See s. 36 (2) of Act in App.

(*l*) *Oulds* v. *Harrison*, 10 Exch. 579; *Re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 358.

(*m*) *Charles* v. *Marsden*, 1 Taunt. 224; *Sturtevant* v. *Ford*, 4 M. & Gr. 101; *Lazarus* v. *Cowie*, 3 Q. B. 464; *Parr* v. *Jewell*, 16 C. B. 684.

(*n*) *Carruthers* v. *West*, 17 L. J. Q. B. 4. But see *Parr* v. *Jewell*. 16 C. B. 684, and ss. 29 (2) & 36 of the Act in App.

(*o*) *Deuters* v. *Townsend*, 5 B. & S. 613; 33 L. J. Q. B. 301.

(*oo*) See ss. 42 & 43 of Act in App.

(*p*) *Rowe* v. *Young*, 2 B. & B. 240. See now s. 44 of Act in App.

(*q*) *Campbell* v. *French*, 6 T. R. 212. See now s. 14 of Act in App.

which the bill is accepted, and inclusively of the day on which it falls due (*r*). If no time at all is stated upon the face of the bill (*s*), or if it is payable at sight or on presentation (*t*), the instrument will be payable on demand (*tt*).

Proof of the acceptance.—By the 19 & 20 Vict. c. 97, s. 6, (reproduced by sect. 17 of the Act, 1882, see Appendix), it is enacted, that no acceptance of any bill of exchange, whether inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him (*u*). The acceptance is usually made by the drawee's writing across the bill the word "accepted," and signing his name thereto. Formerly, if the drawee merely wrote his name upon the face of the bill, without the word "accepted," or if he wrote "accepted," "presented," or any direction to pay addressed to a third party, or merely put his mark upon the bill, or promised in writing to accept or pay the bill, this was evidence for a jury of an acceptance of the instrument by him (*v*); and so was a letter from his solicitor after action, admitting the signature to be in his handwriting (*x*). Since the above statute, however, it was held that simply writing the name of the drawee across the face of the bill without any words indicating an intention to be bound as acceptor was not a valid acceptance (*y*). But now, by the 41 Vict. c. 13, s. 1, (reproduced by sect. 17 of the Act, 1882, see Appendix,) "An acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statute, by reason only that such acceptance consists merely of the signature of the drawee written on such bill" (*z*). If the name of the acceptor is written upon the bill by a third party, and the latter places his mark against the name as adopting such signature, there is a sufficient acceptance of the instrument (*a*). If the drawee, after he has put his name to the bill, and before he has parted with the possession of it or notified his acceptance, changes his mind, and runs his pen through the signature, the acceptance is cancelled, and he cannot be made liable upon the bill (*b*).

Fictitious indorsee.—If the acceptor has authorized the drawing and indorsement of the instrument in a particular form, or in the names of fictitious persons, he cannot afterwards object

(*r*) *Coleman* v. *Sayer*, 1 Barnard, 303; *Bellasis* v. *Hester*, 1 Ld. Raym. 281; Byles, p. 134.
(*s*) *Abbott* v. *Douglas*, 1 C. B. 491.
(*t*) 34 & 35 Vict. c. 74.
(*tt*) Sect. 10 of the Act in App.
(*u*) *Fentum* v. *Pocock*, 5 Taunt. 196.
(*v*) *Powell* v. *Monnier*, 1 Atk. 612; Bull. N. P. 270 *Wynne* v. *Raikes*, 5 East, 514; *Grant* v. *Hunt*, 1 C. B. 59.
(*x*) *Chaplin* v. *Levy*, 9 Exch. 531.
(*y*) *Hindlaugh* v. *Blakey*, 3 C. P. D. 136.
(*z*) And see *Steele* v. *M'Kinlay*, 5 Ap. Cas. 754; the effect of the statute is to overrule *Hindlaugh* v. *Blakey*, *supra*.
(*a*) *George* v. *Surrey*, 1 M. & M. 516.
(*b*) *Cox* v. *Troy*, 5 B. & Ald. 474. Sect. 21 of Act in App.

to such drawing or indorsement (c). Nor where he has accepted in blank can he show that the drawing or indorsement is a forgery (d).

Liability of the acceptor—Failure of consideration.—As between the acceptor and the drawer of a bill, failure of consideration is an answer to an action for the amount of the bill, so that, if a person purchases a bill payable at the end of three months for goods or money to be delivered to the acceptor at the end of one month, and the goods or the money are not delivered, the acceptor is not liable upon the bill, unless it was indorsed before it became due to a *bonâ fide* holder for value (e). When the bill has been negotiated the acceptor, except in case of a qualified acceptance (ee), is bound to pay the bill at maturity, and to find out the holder for that purpose. He is not entitled to any presentment or formal demand of payment; and a request in the shape of the issue of a writ is the only request that need be made him by the indorsee, although the bill be made payable on demand (f). A person who has accepted a bill of exchange cannot escape from liability to a *bonâ fide* indorsee by setting up a forgery of the name of the drawer (g). "The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and his discharge *pro tanto* in his account with the drawer, and to one who should refuse or be unable to deliver up the bill, the acceptor is not bound, without an indemnity, to pay the sum therein specified" (h).

An acceptance of a bill of exchange can only be made by the party to whom the bill is addressed, or for his honour. An acceptance by any other person is not an acceptance within the usage and custom of merchants. Thus, where one John Hart drew a bill payable to himself or order, and addressed it to himself "John Hart," and across the face of the instrument was written, "Accepted, H. J. Clarke," it was held that Clarke could not be sued as acceptor of a bill of exchange directed to him. Such a bill so accepted would appear to be a promissory note, made by the acceptor, to pay the sum mentioned therein to the drawer or his order (i). But, if the party to whom the bill is addressed writes his acceptance upon it in a name totally different from his own name, he will be liable upon the instrument, as he may accept it in any name he thinks fit to adopt (k). Persons

(c) *Ashpitel* v. *Bryan*, 5 B. & S 723; 32 L. J. Q. B. 91; 33 *ib.* 328. See now s. 54 of the Act in App.

(d) *London & S. W. Bank* v. *Wentworth*, *ante*, p. 753.

(e) *Astley* v. *Johnson*, 5 H. & N. 141; 29 L. J. Ex. 161; *Puget de Bras* v. *Forbes*, 1 Esp. 117.

(ee) Sect. 52 (2) of the Act.

(f) *Rumball* v. *Ball*, 10 Mod. 38. Sect 52 (1) of the Act.

(g) *Mather* v *Maidstone*, 18 C. B. 295, 25 L J C. P. 311.

(h) *Ramuz* v *Crowe*, 1 Exch. 173. Sec s. 52 (4) of the Act.

(i) *Davis* v *Clarke*, 6 Q. B. 19; *Fielder* v. *Marshall*, 30 L. J. C. P. 158.

(k) *Lindus* v. *Bradwell*, 5 C. B. 583; 17 L. J. C. P. 123. See s. 23 of the Act.

may, as we have before seen, draw, accept, or indorse bills in assumed or adopted names, and render themselves responsible upon the instrument by so doing (*l*); but, if the name of a party appearing on the face of a bill as drawer or indorser has been placed there without his authority, he cannot, of course, be made responsible upon the instrument, but the indorsee or holder must proceed against his own immediate indorsee, or the party from whom he got the bill. If the name of a party is misspelled, oral evidence is admissible to show who was intended (*m*). The acceptor cannot set up, as a defence to an action by an indorsee, that the drawer and first indorser was an uncertificated bankrupt at the time the acceptance was given. If he credits the bill of a bankrupt, he is responsible to every *boná fide* holder (*n*). The acceptor is liable to indemnify any indorser who may pay the bill (*o*).

Liability of the drawer and indorser.—Every person who draws or indorses a bill of exchange impliedly enters into a conditional contract to pay the amount of the bill to the payee or his assignee, if the acceptor does not pay the amount, unless he indorsed as agent for the plaintiff for the accommodation of the latter, and without value (*p*). When a bill is dishonoured, it is generally thrown back upon the first indorser, each indorser taking back from his immediate indorser what he has paid on account of the bill, and at the same time delivering up the bill to him, and the latter again throwing it back on his immediate indorser, till it at last arrives at the first indorser. They may arrange the matter amongst themselves; and any one indorser may sue the acceptor or drawer instead of any one of the preceding indorsers, striking out all the names upon the bill below his own (*q*). But, as the liability of the drawer and indorsers is a secondary and conditional liability, accruing only in default of payment by the acceptor, there must be proof of a regular presentment of the bill to the latter after it became due, and non-payment of the amount, termed a dishonour of the bill, and notice of such presentment and dishonour to the drawer or indorser, before the absolute liability of the latter upon the instrument can attach. Where the defendant was induced to put his name upon the back of a bill of exchange by the fraudulent representation of the acceptor that it was a guarantee, and the defendant signed it without knowing that it

(*l*) *Jenkins* v. *Morris*, 16 M. & W. 881.

(*m*) *Willis* v. *Barrett*, 2 Stark. 29. Sect. 32 (4) of the Act.

(*n*) *Braithwaite* v. *Gardiner*, 8 Q. B. 473; *Halifax* v. *Lyle*, 3 Exch. 453. Sect. 54 (2) of the Act.

(*o*) *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 Ap. Cas. 1. Sect. 57 of the Act.

(*p*) *Castrique* v. *Buttigieg*, 10 Moore, P. C. 109. See s. 55 of the Act.

(*q*) *Walwyn* v. *St. Quintin*, 1 B. & P. 658.

was a bill, and under the belief that it was a guarantee, and was guilty of no negligence in so signing it, it was held that he was not liable to a *bonâ fide* holder for value (*r*). The indorser is in a position of secondary liability or *quasi* suretyship for the payment of a bill; and when the indorser has paid the bill he is entitled to any securities which may have been deposited by the acceptor with the holder (*s*).

Giving time for payment.—The parties whose names appear upon the face of the bill are liable as principals and sureties, in the order in which they stand; and the rule that a release or discharge, or time given for payment to the principal, operates as a release or discharge to the surety (*ante*, p. 661), is applicable to such instruments. By giving time, therefore, to the acceptor, the drawer and indorsers will be discharged (*t*). But a binding agreement with a person who is no party to the bill, to give time to the acceptor, without the consent of the drawer, does not discharge the drawer (*u*). As between the holder and the acceptor, the acceptor is the principal debtor, and the drawer and indorsers are his sureties; but, as between the holder and the drawer, the drawer is the principal debtor, and the indorsers are his sureties; and, as between the holder and second indorser, the second indorser is the principal, and the subsequent or third indorser is his surety. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals (*x*).

Presentment for payment.—There is a sufficient presentment of the bill for payment, if payment has been demanded of the wife, clerk, or other agent of the drawee or acceptor at his residence, or at his customary place of business. If the drawee be dead, the presentment must be made to his personal representatives, and, if he have none, then at his last place of residence. When it is made at the place of business of the acceptor, it should be made during the usual hours of business (*y*); and, when it is made at his place of residence, it should be made at a period of the day or evening when he may reasonably be expected to be found there (*z*). "The holder is to present promptly, and to

(*r*) *Foster* v. *Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310.

(*s*) *Duncan, Fox & Co.* v. *North & S. Wales Bank*, 6 Ap. Cas. 1.

(*t*) *English* v. *Darley*, 2 B. & P. 61; *Moss* v. *Hall*, 5 Exch. 49; 19 L. J. Ex. 205; *Davies* v. *Stainbank*, 6 De G. M & G. 679; *Greenough* v. *M'Clelland*, 2 El. & El. 424; *Lawrence* v. *Walmsley*, 12 C. B. N. S. 799; 31 L. J. C. P. 143; *ante*, pp. 660, 661.

(*u*) *Frazer* v. *Jordan*, 8 Ell. & Bl. 308; 26 L. J. Q. B. 288.

(*x*) Byles, 179; *ante*, pp. 660, 661.

(*y*) *Elford* v. *Teed*, 1 M. & S. 28; *Whitaker* v. *Bank of England*, 1 C. M. & R. 744.

(*z*) *Wilkins* v. *Jadis*, 2 B. & Ad. 188. See s. 45 (3) of the Act.

communicate without delay notice of non-payment or of the insolvency of the acceptor; for a party is not only entitled to knowledge of insolvency, but to notice that, in consequence of such insolvency, he will be called upon to pay the amount of the bill" (a). If the acceptance is a conditional acceptance, the condition must be strictly accomplished; but the holder is not bound to present the bill the very day that it becomes due, unless the condition is express to that effect (b). If the bill is accepted payable at a particular place, it is not necessary, in order to charge the acceptor upon the bill, that it should be presented for payment at that place, unless the acceptor expressly specifies on the face of the bill that it will be paid there and nowhere else. But the drawer cannot be charged upon a bill made payable by him at a place indicated, unless the bill has been presented at that place. (See now sect. 45 of the Act.) If the acceptor accepts, payable at a banker's, he undertakes (1 & 2 Geo. 4, c. 78, reproduced by sect. 19 (2) of the Act in Appendix) to pay the bill at maturity, when presented for payment either to himself or at the banker's; if he accepts payable at a banker's, and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise (c). The statute is confined to the case of acceptors, and does not alter the liability of drawers of bills of exchange. Therefore, if the drawer has directed, by the body of the bill, that the amount he draws for shall be paid at a particular place, the bill must be presented at that place before he (the drawer) can be made responsible for non-payment (d). If the banker at whose bank the bill is payable is the holder of the bill at the time of its maturity, there is a sufficient presentment. If the bill is made payable at a particular town, and the holder goes there with the bill, and makes inquiry for the party to whom it is to be presented, and the latter is not to be found, this is a sufficient presentment at the place indicated (e). If the bill is made payable at a particular house, presentment to an inmate may suffice (f); or, if the house be shut up, at the house door (g); and, if two places be named, the holder has the option to present it at either (h). "A presentment according to the directions of a forged acceptance cannot be a good presentment as against the drawer" (i). The mention of the names and address of the London agents in a memorandum at the foot of a country banker's cheque does not

(a) *Camidge* v. *Allenby*, 6 B. & C. 383.
(b) *Smith* v. *Vertue*, 30 L. J. C. P. 56. Sect. 52 (2) of the Act.
(c) *Halstead* v. *Skelton*, 5 Q. B. 93.
(d) *Gibb* v. *Mather*, 1 M. & Sc. 387; *Saul* v. *Jones*, 28 J. L. Q. B. 37.
(e) *Hardy* v. *Woodrooffe*, 2 Stark. 319. Sect. 46 (2) of the Act.
(f) *Buxton* v. *Jones*, 1 M. & Gr. 83.
(g) *Hine* v. *Allely*, 4 B. & Ad. 624.
(h) *Beeching* v. *Gower*, Holt, N. P. 314.
(i) *Wetton* v. *Hodd*, 18 Jur. 630.

make the cheque payable at the place so indicated; and non-payment there on presentment is not necessarily a dishonour (*k*).

Non-presentment when excused.—See now sect. 46 of the Act in Appendix. If the acceptor absconds, or shuts up his house and cannot be found, presentment is excused, because it cannot be made, and the bill may be treated as a dishonoured bill; but, if the acceptor has merely removed to a different residence, and can be discovered, the bill must be presented in the regular way (*l*). Neither the bankruptcy of the drawee or acceptor, nor a declaration by him that he will not pay the bill, is of itself an excuse for an omission to present for payment (*m*); but, if a banking firm in partnership has notoriously stopped payment and shut up its ordinary place of business, and immediate notice of the insolvency of the firm is given by the holder to the other parties, he will be entitled to recover upon the bill, although there has been no formal presentment (*n*). If the bill is a mere accommodation bill, and the acceptor had no effects of the drawer's in his hands during any portion of the period that the bill had to run, and the drawer could have had no reasonable expectation that the bill would be honoured by the acceptor, presentment to the latter is excused as against the drawer, as the latter cannot have been prejudiced by the want of presentment; for, "if the bill was presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill" (*o*). "But the case of an indorser of a bill of exchange stands upon a different footing from that of a drawer. He (the indorser) is in the nature of a surety or guarantee of its payment on due presentment, and is presumed to know nothing about the arrangement between the drawer and drawee" (*p*). His liability, therefore, upon the bill does not arise until presentment has been duly made, and he has received notice of dishonour.

Days of grace are so called because they were formerly allowed the drawee as a favour; but the laws of commercial countries have long since recognised them as a right. The number of these days varies in different places. The three days of grace allowed in this country are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace. Where there are no days of grace, and the bill falls due on a Sunday, Christmas Day, Good Friday, public fast, or thanksgiving day, or where the last of the days of grace happens

(*k*) *Bailey* v. *Bodenham*, 16 C. B. N. S. 288; 33 L. J. C. P. 252.

(*l*) *Collins* v. *Butler*, 2 Str. 1087.

(*m*) *Sands* v. *Clarke*, 8 C. B. 759; 19 L. J. C. P. 87.

(*n*) *Turner* v. *Stones*, 1 D. & L. 122; *Robson* v. *Oliver*, 16 L. J. Q. B. 437; but see *East of England Banking Co., In re*, L. R. 6 Eq. 368; *ib.* 4 Ch. 18; 38 L. J. Ch. 121, and Chalmers on Bills, Art. 168, and Bills of Ex. Act, s. 46, in App.

(*o*) *Terry* v. *Parker*, 6 Ad. & E. 507.

(*p*) *Carter* v. *Flower*, 16 L. J. Ex. 202.

on such a day, the bill becomes payable on the day preceding, and if not then paid must be treated as dishonoured. (Sect. 14 of the Act in Appendix.) If the last day is one of the public holidays established by the 34 Vict. c. 17, and 38 & 39 Vict. c. 13, the bill is payable on the day following (*q*). Presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties (*r*). By the Bills of Exchange Act, 1871 (*s*), after reciting that doubts had arisen whether a bill payable at sight or on presentation was payable until the expiration of a certain number of days of grace, it is enacted (s. 2) that every bill of exchange or promissory note drawn after that Act came into operation (*t*), and purporting to be payable at sight or on presentation, shall bear the same stamp as, and shall for all purposes whatsoever be deemed to be, a bill of exchange or promissory note payable on demand.

Notice of dishonour.—(See now sect. 49 of Bills of Exchange Act, 1882, in Appendix.) If the bill has been duly presented to the acceptor, and the days of grace have elapsed, and the bill remains unpaid, the holder should give prompt notice of the dishonour of the bill to all the other parties to the instrument against whom he intends to proceed (*u*). It is not necessary to give notice to the trustee of a bankrupt if notice be given to the bankrupt himself (*x*). Each indorser is entitled to notice, but not the drawee or acceptor to whom the bill has been presented for payment. The notice should be given by the holder and by each party who intends to sue on the bill within one day, or, at the latest, twenty-four hours after he has received information of the dishonour of the bill, if the residences or places of business of the parties can be discovered with due and reasonable diligence (*y*) But this rule applies only as between the parties to a bill, and does not give a day for communication between the agent of the holder of a bill and such holder who resides at a distance (*z*). A plaintiff in an action on the bill need not himself have given all the notices; he may avail himself of a notice duly given by any other party to the bill (*a*). When the bill becomes payable on the Sunday, Good Friday, or Christmas Day, the notice need not be given until the day after (*b*). Where a bill of exchange was

(*q*) 34 Vict. c. 17.

(*r*) Byles, 5th ed. 150, 151; *Tassell* v. *Lewis*, 1 Ld. Raym. 743.

(*s*) 34 & 35 Vict. c. 74. Reproduced by Bills of Ex. Act, 1882, ss. 10 & 14.

(*t*) Aug. 14th, 1871.

(*u*) *Maltass* v. *Siddle*, 6 C. B. N. S. 501; 28 L. J. C. P. 257.

(*x*) *Ex parte Baker*, 4 Ch. D. 795, C. A.

(*y*) *Gladwell* v. *Turner*, L. R. 5 Ex. 59; 39 L. J. Ex. 31.

(*z*) *Leeds Banking Co., In re*, L. R. 1 Eq. 1; 35 L. J. Ch. 33; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 460; 38 L. J. Q. B. 232.

(*a*) Jervis, C. J., *Rowe* v. *Tipper*, 13 C. B. 256; 22 L. J. C. P. 135.

(*b*) 7 & 8 Geo. 4, c. 15; 6 & 7 Will. 4, c. 58, s. 2. (Repealed and reproduced by Bills of Ex. Act, s. 92, in App.)

indorsed to a branch bank of a London banking-house who sent it to another branch of the same bank, who indorsed it to the head establishment in London, it was held that each of the branch banks was to be considered an independent indorsee or holder, and each entitled to the usual notice of dishonour (c). Any agent in possession of the bill may give the notice; and it need not state at whose request it was given, nor who was the owner of the bill. Any persons also who pay the bill for the honour of a party thereto become, on payment, holders as upon a transfer from the person for whom they made the payment, and are entitled to avail themselves of a notice of dishonour given by any of the parties to the bill (d).

What amounts to notice of dishonour.—(See now sect. 49 (5) (6) of the Bills of Exchange Act, 1882, in Appendix.) A mere demand of payment of a bill does not amount to notice of dishonour (e); but an intimation that the bill has not been paid by the acceptor, or that it has not been paid in regular course, accompanied or unaccompanied by a demand of payment will be sufficient (f). A mistake in the name of the person on whose behalf the notice is given will not avoid the notice, but will place the party giving it in the same situation as to the party to whom it is given as if the representation had been true, so that the defendant will have every defence against the plaintiff that he would have had if the notice had been really given by the party named (g). A misdescription, also, of the bill, not misleading the party receiving the notice, will not vitiate such notice (h). If the bill has really been dishonoured at the time the notice is given, but the party giving the notice was not himself certain of the fact at the time he gave the notice, it is no objection to the notice (i). The notice may be either written or verbal. Any form of words conveying information to the mind of the party to whom it is addressed, that the bill has been presented and dishonoured, given to the party, or left at his usual place of business during business hours, or at his private residence, is sufficient (k). If the house is shut up, and the party sent to give notice puts a written notice

(c) *Clode* v. *Bayley*, 12 M. & W. 51.

(d) *Gaodall* v. *Polhill*, 1 C. B. 242. See s. 68 of the Act.

(e) *Solarte* v. *Palmer*, 7 Bing. 530; 2 Cl. & F. 97; *Strange* v. *Price*, 10 Ad. & E. 125; *Leeds Banking Co., in re*, *supra*.

(f) *Bailey* v. *Porter*, 14 M. & W. 44; *Paul* v. *Joel*, 4 H. & N. 355; 28 L. J. Ex. 143.

(g) Parke, B., *Harrison* v. *Ruscoe*, 15 M. & W. 236; 15 L. J. Ex. 110.

(h) *Bromage* v. *Vaughan*, 16 L. J. Q. B. 10; *Rowlands* v. *Springett*, 14 M. & W. 7; *Mellersh* v. *Rippen*, 21 L. J. Ex. 222.

(i) *Jennings* v. *Roberts*, 24 L. J. Q. B. 104.

(k) *Phillips* v. *Gould*, 8 C. & P. 355; *Hartley* v. *Case*, 4 B. & C. 341; 6 D. & R. 505; *Lewis* v. *Gompertz*, 6 M. & W. 403; *East* v. *Smith*, 16 L. J. Q. B. 295; *Carter* v. *Flower*, *ib.* Ex 201; *Chard* v. *Fox*, 14 Q. B. 201; *Everard* v. *Watson*, 22 L. J. Q. B. 222; *Caunt* v. *Thompson*, 7 C. B. 411; 18 L. J. C. P. 128; *Metcalfe* v. *Richardson*, 11 C. B. 1011; *Maxwell* v. *Brain*, 10 Jur. N. S. 777.

through or under the door, that will suffice (*l*). It is also sufficient, if the notice is sent to a place which the indorser has held out as a place where he is likely to be found for the purpose of receiving notice, although it is neither his place of business, nor his residence (*m*).

Posting the notice.—The notice of dishonour should, if possible, be communicated by the next post, if a post leaves within a few hours after information of the dishonour of the bill (*n*). If the letter, by the mistake of the post-master, does not reach its destination, the party who posts it will not suffer; he does all that is usual and necessary, and does not guarantee the correctness of the post-office delivery (*o*). But the letter, when sent by post, must of course be properly directed; and, when it is sent to a large town, the street and number of the house in which the party to whom the notice is given resides should be stated (*p*), unless the latter is the drawer of the bill, and states his address in an equally general manner (*q*). Where the address is the only one known to the senders it is sufficient (*r*). An action is maintainable immediately after the notice has been received by the party to whom it is addressed; and it is sufficient for the plaintiff to show that the defendant must have received it according to the usual routine of the post-office delivery prior to the issuing of the writ (*s*).

Foreign bill—Protest—Noting—Damages—Re-exchange.—When a foreign bill is refused acceptance or payment, the dishonour must be announced by a PROTEST, which should be made by a notary public, or, if there be none, by an inhabitant of the place where the bill is payable, in the presence of two witnesses (*t*). The protest simply announces the presentment and non-acceptance or non-payment of the bill. Noting is a minute made on the bill by the officer at the time of the refusal to accept, and is the preparatory step to protest. Notice of protest and of the dishonour of a foreign bill should always be sent by the first available opportunity (*u*). If a foreign bill is taken up and paid for honour, the payment must be preceded or accompanied by a declaration, made in the presence of a notary, for whose honour the party pays the bill, which should be recorded by the notary

(*l*) *Allen* v. *Edmundson*, 2 Exch. 723; *Housego* v. *Cowne*, 2 M. & W. 348.

(*m*) *Berridge* v. *Fitzgerald*, L. R. 4 Q. B. 639; 38 L. J. Q. B. 335.

(*n*) *Darbishire* v. *Parker*, 6 East, 8. Sect. 49 (12) & (15) of the Act in App.

(*o*) Parke, B., *Woodcock* v. *Houldsworth*, 16 L. J. Ex. 49; 16 M. & W. 124.

(*p*) *Walter* v. *Haynes*, R. & M. 149.

(*q*) *Clarke* v. *Sharp*, 3 M. & W. 166; *Burmester* v. *Barron*, 17 Q. B. 828.

(*r*) *Ex parte Baker*, 5 Ch. D. 795, C. A.

(*s*) *Castrique* v. *Bernabo*, 6 Q. B. 498.

(*t*) Byles, 5th ed. 189. See s. 94 of the Act.

(*u*) *Muilman* v. *D'Eguino*, 2 H. Bl. 565. See now s. 51 of the Act.

either on the protest or in a separate instrument (*x*). A bill of exchange payable in France, though drawn in England, is a foreign bill; and notice of dishonour according to French law is sufficient in an action against an indorser in England (*y*). The drawer in a foreign country is entitled to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses, including re-exchange, as are caused by the dishonour (*z*).

Proof of notice of dishonour.—A promise by the defendant, after the bill becomes due, to pay the amount thereof, or a part payment, or the offer of it, or an admission by the defendant of his liability upon the bill, is evidence that notice of dishonour was duly given (*a*), or that without such notice the defendant is the proper person to pay the bill (*b*). A promise, after the bill is due, to pay the holder the amount of the bill, operates as "an admission on the part of the defendant that the holder had a right to resort to him upon the bill;" and, "if, when payment is demanded, the party omits to avail himself of the preliminary objection of want of protest or want of notice, it is a question of fact whether he does not thereby admit that all the steps that are essential to create liability in him have been duly taken" (*c*). If the defendant has suffered judgment by default in a prior action against him on the same bill, this is an admission by him of his liability upon the instrument, so as to dispense with proof of notice of dishonour (*d*).

Dispensation of notice.—(See section 50 of the Act in Appendix.) Notice of the dishonour of a bill may be dispensed with and excused by the conduct and declaration of the party otherwise entitled to it. If the party to whom the notice is to be given absents himself from his place of business, and the holder goes or sends there, and finds no one to receive the notice, this is equivalent to a dispensation of notice, since, according to the usage of merchants, a man who puts his name to a bill ought to be ready at his place of business to receive notice of dishonour (*e*). Where the drawer stated to the holder of the bill, a few days before the bill became due, that he had no regular residence to which notice could be sent, and that he would himself call upon the acceptor and see if the bill was

(*x*) *Geralopulo* v. *Wieler*, 10 C. B. 719. Sect. 68 of the Act.

(*y*) *Hirschfield* v. *Smith*. L. R. 1 C. P. 340; 35 L. J. C. P. 177; *Horne* v. *Rouquett*, 3 Q. B. D. 514. Sect. 72 (3) of the Act.

(*z*) *In re General South American Co.* 7 Ch. D. 637. See sect. 57 (2).

(*a*) *Hicks* v. *Duke of Beaufort*, 4 Bing. N. C. 229; 5 Sc. 598; *Brownell* v. *Bonney*, 1 Q. B. 39; *Jackson* v. *Collins*, 17 L. J. Q. B. 142.

(*b*) *Potter* v. *Rayworth*, 13 East, 418.

(*c*) *Campbell* v. *Webster*, 2 C. B. 265.

(*d*) *Rabey* v. *Gilbert*, 6 H. & N. 536; 30 L. J. Ex. 170.

(*e*) *Allen* v. *Edmundson*, 17 L. Ex. 291; 2 Exch. 723.

paid, it was held that he had thereby expressly dispensed with notice of dishonour from the holder (*f*). It has been also held that notice of dishonour to the drawer had been dispensed with or waived in the following cases:—where the drawer had himself countermanded the payment of the bill (*g*); where he stated, the day before a bill became due, that it would not be paid, and that it was not worth while to trouble him with a post letter to give him notice (*h*); where his residence was unknown, and the holder could not, by the exercise of reasonable diligence and inquiry, discover it (*i*); where he had made the bill payable at his own house (*k*); where he had no effects at any time in the hands of the acceptor, and would have no remedy against the acceptor or any other person in consequence of his being obliged to pay the bill (*l*); where he had not sufficient effects in the hands of the acceptor at the time when he would reasonably expect the bill to be presented for payment, and no reasonable expectation that it would be paid (*m*); where, although goods had been sold by him to the drawee, yet a long period of credit had been given, and he had drawn the bill without any reasonable expectation that it would be accepted or paid (*n*). And a waiver of notice of dishonour may be inferred from a subsequent promise to pay, or any admission of liability on the bill, by the party entitled to notice (*o*).

If the drawer draws on a person who is not his debtor, nor has received any value for the bill, the bill must be considered *primâ facie* an accommodation bill. In such a case, the drawer is himself the person who ought to provide funds and pay the bill; and he is not, consequently, entitled to notice of dishonour (*p*). But the case is otherwise where the drawer has a fluctuating balance in the hands of the drawee (*q*); for the drawer has a right to notice of dishonour, if he has effects in the hands of the acceptor at any time from the drawing of the bill till it becomes due (*r*). But the state of the accounts as between the drawer and drawee does not in anywise do away with the necessity of notice of dishonour to the indorser. When the action is brought against the latter, "it is not enough, even *primâ facie*, to dispense with notice, simply to state that he had indorsed without value, or had

(*f*) *Phipson* v. *Kneller*, 4 Campb. 285.

(*g*) *Hill* v. *Heap*, D. & R. N. P. C. 57.

(*h*) *Burgh* v. *Legge*, 5 M. & W. 421.

(*i*) *Bateman* v. *Joseph*, 2 Campb. 461.

(*k*) *Sharp* v. *Bailey*, 9 B. & C. 45.

(*l*) *Cory* v. *Scott*, 3 B. & Ald. 622; *Thomas* v. *Fenton*, 5 D. & L. 39.

(*m*) *Carew* v. *Duckworth*, L. R. 4 Ex. 313; 38 L. J. Ex. 149.

(*n*) *Claridge* v. *Dalton*, 4 M. & S. 231.

(*o*) *Woods* v. *Dean*, 3 B. & S. 101; 32 L. J. Q. B. 1; *Cordery* v. *Colville*, *ib.* C. P. 210; 14 C. B., N. S. 374. *Rabey* v. *Gilbert*, 6 H. & N. 536; 30 L. J. Ex. 170.

(*p*) *Bickerdyke* v. *Bollman*, 1 T. R. 405. Sect. 52 (2) c. of the Act.

(*q*) *Blackham* v. *Doran*, 2 Campb. 503.

(*r*) *Hammond* v. *Dufrene*, 3 Campb. 145.

no effects in the hands of prior parties." And an allegation that no damage was sustained by him from want of notice is clearly insufficient. The indorser stands, as we have seen, upon a different footing from the drawer. If he has indorsed to the holder without value or effects in the hands of prior parties, it does not follow that he is not entitled to notice; for he may have indorsed for the accommodation of others, when he will have a right to notice, because on payment he may recover against those persons (*s*). Where the intention of all parties to an accommodation bill was that it should be met by the last indorser, the previous indorsers cannot be sued unless they have had notice of dishonour (*t*). The bankruptcy of the drawee or acceptor, however notorious, constitutes no excuse for an omission to give notice of dishonour (*u*); and the knowledge of the bankruptcy by the party entitled to notice is not equivalent to notice (*x*).

Transfer by delivery without indorsement.—(See now sect. 58 of the Act in Appendix.) A transfer by mere delivery without indorsement does not, as we have before seen, render the transferor liable to the transferee upon the bill itself, although he may, under certain circumstances, become liable to refund the money he received in exchange for the bill, if the bill is dishonoured at maturity and turns out to be a mere piece of waste paper. If a man goes into the money market with a bill of exchange, and gets it discounted without putting his name upon the back of it, and, in effect, sells the bill for what he can get for it, he is not responsible for the repayment of the money he received in exchange for it, if the parties to the bill turn out to be insolvent and the bill becomes worthless, unless he knew of the insolvency and the consequent worthlessness of the bill at the time he offered it for sale in the market (*y*). But, if the bill is a forgery, and is not what it purports upon the face of it to be, the transferor is bound to refund the money he received by way of discount upon the bill, as the transferee has not got what was agreed to be transferred to him in exchange for his money, and there is consequently a total failure of the consideration for the money (*z*).

Bills taken up supra protest.—(See now sect. 68 of the Act in Appendix.) A person who takes up a bill *supra protest* for the benefit of a particular party to the bill succeeds to the title of the party from whom, not for whom, he receives it, and has all

(*s*) *Carter* v. *Flower*, 16 L. J. Ex. 199; 16 M. & W. 743; *Maltass* v. *Siddle*, 28 L. J. C. P. 257; 6 C. B. N. S. 501: *Foster* v. *Parker*, 2 C. P. D. 18. Sect. 52 (2) d. of the Act.

(*t*) *Turner* v. *Samson*, 2 Q. B. D. 23.

(*u*) *Thackeray* v. *Blackett*, 3 Campb. 164.

(*x*) *Esdaile* v. *Sowerby*, 11 East, 114.

(*y*) *Fenn* v. *Harrison*, 3 T. R. 579; *Ex parte Shuttleworth*, 3 Ves. 368; *Fydell* v. *Clark*, 1 Esp. 447.

(*z*) *Gurney* v. *Womersley*, 4 Ell. & Bl. 133; 24 L. J. Q. B. 47.

the title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honour he takes it up, and that he cannot himself indorse it over (*a*).

Retiring of bills by acceptors and indorsers.—"If an acceptor retires a bill at maturity, he takes it entirely from circulation, and the bill is in effect paid; but, if an indorser retires it, he merely withdraws it from circulation in so far as he himself is concerned, and may hold the bill with the same remedies as he would have had, had he been called upon in due course, and had paid the amount to his immediate indorsee" (*b*).

Payment and satisfaction of a bill of exchange as between a drawer or indorser and an indorsee, whether before or after the bill becomes due, does not enure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee (*c*), unless the bill is an accommodation bill (*d*), but the indorsee on recovering from the acceptor is a trustee for the drawer or indorser, as the case may be, for the amount of the payment (*e*). If, however, the acceptor has a set-off against the person making such payment, he may set it off against the indorsee to the extent of the payment so made (*f*). Satisfaction should always be made to the holder and proprietor of the bill; and payment to any other party will not discharge the acceptor, unless the money reaches the holder, and the latter treats it as received in liquidation of the bill. Payment to the holder is good, although the latter may have stolen the bill, or become wrongfully possessed of it, provided the payment be *bonâ fide* in the usual course of business (*g*).

Promissory notes.—By the 3 & 4 Anne, c. 9 (now reproduced by sects 83, 89 of Bills of Exchange Act in Appendix), it is enacted, that all notes in writing made and signed by any person, body politick or corporate, or by the servant or agent of any corporation, banker, or trader, usually intrusted to sign promissory notes, whereby such person, body politick, &c., shall promise to pay to any other person or persons, &c., his or their order, or unto bearer, any sum of money mentioned in such note, shall be assignable or indorsable over in the same manner as inland bills of exchange. Any order or promise in writing, therefore, for the payment of a certain or definite sum of money absolutely and unconditionally to a person therein named, or "to

(*a*) *Re Overend, Gurney & Co., Ex parte Swan*, L. R. 6 Eq. 344.

(*b*) Jervis, C. J., *Elsam* v. *Denny*, 15 C. B. 94; 23 L. J. C. P. 192. Sect. 59 & 61 of the Act in App.

(*c*) *Jones* v. *Broadhurst*, 9 C. B. 173; *Randall* v. *Moon*, 12 C. B. 261.

(*d*) *Cook* v. *Lister*, 32 L. J. C. P. 121; 13 C. B. N. S. 543.

(*e*) *Jones* v. *Broadhurst*, 9 C. B. 173. Sect. 59 of the Act.

(*f*) *Thornton* v. *Maynard*, L. R. 10 C. P. 695.

(*g*) *Williams* v. *James*, 15 Q. B. 498. Sects. 38 & 59 of the Act.

his order," or "to bearer," duly stamped, will constitute a negotiable promissory note (*h*). A promise also in writing to pay a sum of money to bearer, without mentioning any particular person by name, or a promise to pay to a fictitious person or bearer, is a negotiable note within the statute (*i*). A promise to pay "to A., B., and C., or to their order, or the major part of them, 100*l*.," is a promissory note (*k*). If it appears doubtful whether the instrument was intended to be a bill or a note, it may be treated either as the one or the other, at the election of the payee (*l*). An instrument in the form of a bill of exchange addressed to no one, but accepted by the defendant, may be treated as a promissory note (*m*). But, if it is a mere inchoate instrument, having neither the name of a drawer nor of a payee upon it, it is not a note (*n*). A promissory note need not contain an express promise in terms upon the face of it; it is sufficient if the promise appears by necessary inference from the words used (*o*). A note in writing, for example, to the following effect, "I promise to account with A. B., or order, for 50*l*. value received by me," has been held a promissory note negotiable within the statute of Anne (*p*). And its negotiability is not destroyed by an acknowledgment upon the face of it of a deposit of title deeds as a collateral security for the payment of the money (*q*). But it must in all cases, like bills of exchange, be drawn or made for the payment of money by some certain person absolutely and unconditionally. If the promise is in the alternative to pay if somebody else does not (*r*), or if the payment is to depend upon a contingency or the happening of any uncertain event, or if it is to be made out of a particular fund which may or may not be available, the instrument is not negotiable, and cannot be transferred by indorsement or in any other manner (*s*). Any words, indeed, upon the face of the note qualifying the promise, and rendering the ultimate liability to pay the money uncertain, will deprive the note of negotiability, and render it a mere agreement (*t*).

A promise to pay "as per memorandum of agreement" is not a qualified or conditional promise (*u*); nor is a promissory note payable by instalments, subject to a condition that, on default being made in payment of the first instalment, the whole amount

(*h*) *Jury* v. *Barker*, Ell. Bl. & Ell. 459; 27 L. J. Q. B. 255.

(*i*) *Grant* v. *Vaughan*, 3 Burr. 1527.

(*k*) *Watson* v. *Evans*, 1 H. & C. 662; 32 L. J. Ex. 137.

(*l*) *Edis* v. *Bury*, 6 B. & C. 435.

(*m*) *Pelo* v. *Reynolds*, 9 Exch. 415; 23 L. J. Ex. 98; *Fielder* v. *Marshall*, 9 C. B. N. S. 606; 30 L. J. C. P. 158.

(*n*) *M'Call* v. *Taylor*, *ante*, p. 752.

(*o*) *Miller* v. *Thompson*, 4 Sc. N. R. 204.

(*p*) *Morris* v. *Lee*, 2 Ld. Raym. 1396; 1 Str. 29; 8 Mod. 362.

(*q*) *Wise* v. *Charlton*, 4 Ad. & E. 786. Sect. 83 (3) of the Act.

(*r*) *Ferris* v. *Bond*, 4 B. & Ald. 679.

(*s*) *Blackenhagen* v. *Blundell*, 2 B. & A. 417; *Hill* v. *Halford*, 2 B. & P. 413.

(*t*) *Robins* v. *May*, 11 Ad. & E. 213; *Clarke* v. *Percival*, 2 B. & Ad. 660.

(*u*) *Jury* v. *Barker*, *supra*.

should become immediately payable, a note payable upon a contingency, but is, if made payable to order, assignable and indorsable under the statute (*x*). But it was essential in all cases to the negotiability of a bill or note, that it be drawn payable "to bearer" or "to order" (*y*). If those words were omitted, the instrument was formerly not transferable, and the action upon it must have been brought in the name of the original promisee or payee. But, if the words "or order" or "or bearer" have been omitted by mistake, they may, after the bill or note has been signed, be inserted with the consent of all parties in pursuance of an original intention to make the instrument negotiable (*z*). If, also, the person to whom, or to whose order, the money is to be paid, is uncertain, the instrument is not a promissory note, unless it can be treated as payable to bearer. A promise "to pay the secretary for the time being" of an insurance company, being a "floating contingent promise" to pay some person to be ascertained *ex post facto*, was held not a negotiable promissory note payable to bearer (*a*). But this is no longer law (see *ante*, p. 752). A promise to pay to "the trustees of Wesleyan Chapel, Harrogate, or their treasurer for the time being, 100*l*.," was held a good note; for there is no uncertainty as to the payee, as the trustees alone are to be taken as the payees, and the treasurer as their agent only to receive payment (*b*). A note made by several persons, "payable to our and each of our order," is a good promissory note within the statute (*c*).

Transfer of promissory notes.—If the maker of the note promises to pay the amount of the note to his own order, the note is not a promissory note within the statute until it has been indorsed by the maker; and then it becomes, in legal effect, a note payable to bearer, and so falls within the statute (*d*). The first transfer of a note payable to order must, as in the case of bills, be made by indorsement and delivery. If such a note is delivered in the first instance without indorsement, the equitable interest only is transferred to the holder; and, if the note is indorsed by the maker, and not delivered, no right to sue upon the instrument is transferred; and a subsequent delivery by the executor of the maker will not complete the informal transfer, and enable the holder to sue upon the instrument (*e*).

(*x*) *Oridge* v. *Sherborne*, 11 M. & W. 380; *Carlon* v. *Kenealy*, 12 M. & W. 139. See s. 9 of the Act in App.

(*y*) *Plimley* v. *Westley*, 2 Sc. 423; 2 Bing. N. C. 251; but see now s. 8 of the Act in App.

(*z*) *Kershaw* v. *Cox*, 3 Esp. 246.

(*a*) *Storm* v. *Stirling*, 3 Ell. & Bl. 832; 23 L. J. Q. B. 298; *Cowie* v. *Sterling*, 6 E. & B. 333; 25 L. J. Q. B. 335; *Enthoven* v. *Hoyle*, 13 C. B. 394; *Yates* v. *Nash*, 8 C. B. N. S. 581; 29 L. J. C. P. 306.

(*b*) *Holmes* v. *Jaques*, L. R. 1 Q. B. 376; 35 L. J. Q. B. 130.

(*c*) *Absolon* v. *Marks*, 11 Q. B. 19; 17 L. J. Q. B. 7.

(*d*) Sect. 83 (2); *Brown* v. *De Winton*, 17 L. J. C. P. 285; 6 C. B. 336; *Masters* v. *Baretto*, 8 C. B. 433; *Hooper* v. *Williams*, 2 Exch. 20; 17 L. J. Ex. 315; *Gay* v. *Lander*, 17 L. J. C. P. 287; *Flight* v. *Maclean*, 16 M. & W. 51; 16 L. J. Ex. 23; *Wood* v. *Mylton*, 16 L. J. Q. B. 446.

(*e*) *Bromage* v. *Lloyd*, 1 Exch. 32.

Liability of the makers and indorsers.—The maker of a promissory note stands in the same position as the acceptor of a bill of exchange. He is the party primarily liable upon the instrument, and is bound, when the note falls due, to seek out and pay the holder. He is not entitled to presentment, unless the note is payable at or after sight, or is made payable at some particular place (*ee*). A promissory note, payable on demand, need not be presented to the maker in order to charge him, the commencement of an action against him being a sufficient demand of the money. But, in order to charge the indorser, the instrument, whether payable on demand or not, must be duly presented to the maker, and notice of dishonour given (*ante*, pp. 766, 767); and, if payable on demand, it must be presented within a reasonable time, that is, a period reasonable with respect to the circumstances connected with each particular case (*f*).

Indorsement of notes and bills overdue.—As a rule of law the indorsee of a bill or note which is overdue must take it on the credit of the indorser, and can stand in no better position (*g*). He takes it subject to all its equities (*h*). But an original absence of consideration in an accommodation bill does not, it seems, attach to the document, so as to defeat the title of a *bonâ fide* indorsee for value (*i*). In the case of a note payable on demand the same rule will not hold, at all events where the note or cheque has not been made a very long time, for they are not overdue at any particular date. The question for the jury is whether under all the circumstances the indorsee ought to have been led to enquire into the title of the indorser (*k*). A promissory note payable on demand cannot be treated as overdue, so as to affect an indorsee with any equities against the indorser, merely because it is indorsed a number of years after its date, and no interest has been paid on it for several years before such indorsement (*l*). Notes payable at and after sight must be presented to the maker before an action can be maintained against him for non-payment. "He is to see the note before he is to be called upon to pay it" (*m*). When a note is made payable a certain time after sight, the time does not begin to run from the day of the date, but from the day of the note being presented for sight (*n*).

(*ee*) Sect. 87 of the Act

(*f*) *Chartered Mercantile Bank of India, London & China* v. *Dickson*, L. R. 3 P. C. 574. Sect. 86 of the Act.

(*g*) *Brown* v. *Davis*, 3 T. R. 80; *Barough* v. *White*, 4 B. & C. 325.

(*h*) *Sturtevant* v. *Ford*, 4 M. & Gr. 101. Sects. 36 & 89 of the Act.

(*i*) *Carruthers* v. *West*, 11 Q. B. [illegible]; *Ex parte Swan*, L. R. 6 Eq. 345; *Sturtevant* v. *Ford*, *supra*; see Byles on Bills, 13th ed. 171.

(*k*) *London & County Banking Co.* v. *Groome*, 8 Q. B. D. 288. See now sect. 86 of the Act.

(*l*) *Brooks* v. *Mitchell*, 9 M. & W. 15.

(*m*) *Dixon* v. *Nuttall*, 1 C. M. & R. 309.

(*n*) *Sturdy* v. *Henderson*, 4 B. & Ald. 592.

Notes payable at a particular place.—(See now sect. 87 of the Act.) Where the place of payment of a note is merely stated in a memorandum at the foot or in the margin of a note, by way of direction or information to the payee, presentment at the place named is not essential (*o*); but, if any place of payment be mentioned in the body of the note, it is part of the contract; and a presentment at the place indicated must be made. The 1 & 2 Geo. 4, c. 78 (*ante*, p. 764), did not extend to promissory notes (*p*).

Days of grace are allowed on promissory notes (*q*), as well as on bills of exchange (*ante*, p. 765).

Bills and notes for the payment of sums under 1*l.*—The 26 & 27 Vict. c. 105, s. 1, repeals the 17 Geo. 3, c. 30, and so much of any other Act as prohibits or restrains, or imposes any penalty for, the uttering or negotiating any promissory note (not being a note payable to bearer on demand), bill of exchange, draft, or undertaking in writing, being negotiable or transferable, for the payment of 20*s.*, or above that sum and less than 5*l.*, or on which 20*s.*, or above that sum and less than 5*l.*, shall remain undischarged, made, drawn, or indorsed in any other manner than as directed by the said Act. By the 48 Geo. 3, c. 88, s. 2, notes, and bills for the payment of less than 20*s.*, were made absolutely null and void; but this Act is now repealed by the Bills of Exchange Act, 1882, in Appendix. By the 7 Geo. 4, c. 6, heavy penalties are imposed (s. 3) (*r*) upon all persons issuing or negotiating promissory notes payable to the bearer on demand for any sum of money less than 5*l.* By the 23 & 24 Vict. c. 111, s. 19, it was enacted, that it should be lawful for any person to draw upon his banker, who should *bonâ fide* hold money to or for his use, any draft or order for payment to the bearer, or to order on demand, of any sum of money less than 20*s.* This is also repealed as now unnecessary. The issue of bank notes has been subjected to various prohibitions and restrictions by the legislature (*s*).

Dividend warrants, issued by the Bank of England for the payment of dividends on stock in the public funds, are not negotiable, so as to entitle the holder to demand the dividend; but, as there is in general an acknowledgment at the foot of the warrant by the payee of his having received the dividend therein mentioned, it is the custom of the bank to pay the amount to the holder of the warrant and receipt; and these documents are

(*o*) *Price* v. *Mitchell*, 4 Campb. 200; *Williams* v. *Waring*, 10 B. & C. 2.

(*p*) *Spindler* v. *Grellett*, 17 L. J. Ex. 6; *Emblin* v. *Dartnell*, 12 M. & W. 830; *Treeothick* v. *Edwin*, 1 Stark. 468.

(*q*) *Brown* v. *Harraden*, 4 T. R. 153.

(*r*) This Section is partially repealed, See St. L. Rev. Act, 1873.

(*s*) 3 & 4 Wm. 4, c. 98; 7 & 8 Vict. c. 32. These statutes are partially repealed, see St. L. Rev. Acts, 1861, 1874.

accordingly transferred from hand to hand, and are generally considered to be negotiable (*t*).

Foreign scrip.—Scrip issued in England by a foreign government entitling the holder to delivery of definitive bonds of the foreign government, and which by the usage of trade is transferred by mere delivery, passes by such delivery to a *bonâ fide* holder for value without notice that the vendor had no title (*u*).

Bankers' cheques.—A cheque on a banker is a negotiable instrument, payable either to bearer or to order. When it is drawn payable to bearer, it is treated as money or cash, and is transferable from hand to hand, like a bill of exchange, but does not require any acceptance by the banker on whom it is drawn to establish its validity. A person therefore who receives a cheque payable to bearer *bonâ fide* for value, relying on the order of the party making it, is entitled to recover the amount from him, although the cheque has been lost or stolen (*x*). A banker's cheque payable to bearer on demand, given on account of a pre-existing debt, and received by the bearer *bonâ fide*, is indefeasible, although it may have been obtained from the drawer by fraud (*y*). In this respect it does not differ from a bill. When it is drawn payable to order, it is a bill of exchange, and negotiable as such when indorsed (*z*). The holder cannot sue the banker upon whom it has been drawn, unless the banker has accepted the cheque, or promised to pay it to the holder. The post-dating of a cheque, whether it is payable to order or bearer, does not invalidate the instrument in the hands of a *bonâ fide* holder for value with notice that it was post-dated (*a*).

Presentment of cheques for payment.—(See now sect. 74 of Bills of Exchange Act in Appendix.) The holder of a cheque does not lose his remedy against the drawer by reason of nonpresentment within any period short of six years after taking it, unless the insolvency of the banker on whom it is drawn has taken place in the interval, or unless there is an actual loss to the drawer by the delay (*b*). To guard against loss from the insolvency of the drawee, the holder must present the cheque for payment with reasonable promptitude (*bb*). If he neglects so to do, and the drawee afterwards becomes insolvent or stops payment, the loss will fall upon

(*t*) *Partridge* v. *Bank of England*, 9 Q. B. 424—427.

(*u*) *Goodwin* v. *Robarts*, L. R. 10 Ex. 337; Ex. Ch. 1 App. Cas. 476; see also *Rumball* v. *Met. Bank*, 2 Q. B. D. 194.

(*x*) *Watson* v. *Russell*, 3 B. & S. 38; 31 L. J. Q. B. 304; 34 *ib.* 93.

(*y*) *Currie* v. *Misa*, L. R. 10 Ex. 153; 1 Ap. Cas. 554.

(*z*) *Keene* v. *Beard*, 8 C. B. N. S. 372; 29 L. J. C. P. 287; as to presentment of cheques, see *infra*.

(*a*) *Whistler* v. *Foster*, 14 C. B. N. S. 248; 32 L. J. C. P. 161; *Austin* v. *Bunyard*, 6 B. & S. 687; 34 L. J. Q. B. 217; *Bull* v. *O'Sullivan*, L. R. 6 Q. B. 209; 40 L. J. Q. B. 141; *Gatty* v. *Fry*, 2 Ex. D. 265; see s. 13 of Bills of Exch. Act in App.

(*b*) *Robinson* v. *Hawksford*, 9 Q. B. 52; 15 L. J. Q. B. 377.

(*bb*) Sect. 74 (2) of the Act.

the holder of the cheque (*cc*). If the cheque is presented in due time and refused payment, the loss will fall on the drawer (*c*). Sending a cheque by post to the banker on whom it is drawn is generally a good presentment (*d*). If the holder of a cheque sends it to his agent for presentment by the post of the day after that on which he has received it, the agent has the following day to present it for payment (*e*). If the cheque is delivered to the holder by the drawer after banking hours, and after it has become impossible to pay the cheque to a banker on that day, the delivery will count from the succeeding day; and, if the cheque is drawn upon a country bank situate at a distance, such distance must be taken into consideration in determining whether the cheque has been presented within a reasonable time (*f*). Presentment through the post office is generally a proper mode of presentment (*g*).

Garnishees had given a judgment debtor a cheque, but upon service of the order immediately stopped the cheque at the bank; it was held that the giving of the cheque had not extinguished the debt, which was therefore still capable of being attached (*h*). As to crossed cheques, see the Crossed Cheques Act, 1876, *ante*, p. 373, and the Bills of Exchange Act in Appendix, ss. 76—82.

A creditor who takes his debtor's agent's cheque on account of the debt is bound to present it in a reasonable time; and, if by his delay he alters the position of the debtor for the worse, the debtor is discharged, notwithstanding he was not a party to the cheque (*i*).

Summary remedy for non-payment of bills, cheques, and notes.—The 18 & 19 Vict. c. 67 (which no longer applies to the High Court, see R. S. C. 6 a. Or. 2, r. 6, Wilson, 3rd ed., p. 186) provides a summary form of proceeding for the recovery of money due on bills, cheques, and notes, which must be commenced within six months after the same shall have become due and payable. It enables the plaintiff to sign final judgment for the principal and interest, if the defendant shall not have obtained leave from a judge to appear and defend the action under the circumstances therein specified and provided for (*k*). In the case of notes payable on demand, the proceeding must be taken within six months from the date of the note (*l*). A party

(*cc*) Sect. 74 (3) of Act in App. as to measure of loss.

(*c*) *[illegible]ces* v. *Rand*, 3 C. B. N. S. 442; 27 L. J. C. P. 76; *Bailey* v. *Bodenham*, 16 C. B. N. S. 288; 33 L. J. C. P. 252.

(*d*) *Heywood* v. *Pickering*, L. R. 9 Q. B. 428. Sect. 45 (8) of the Act.

(*e*) *Rickford* v. *Ridge*, 2 Campb. 537; *Hare* v. *Henty*, 10 C. B. N. S. 65; 30 L. J. C. P. 302; *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455.

(*f*) *Bond* v. *Warden*, 1 Coll. Ch. C. 583.

(*g*) *Prideaux* v. *Criddle*, L. R. 4 Q. B. 455. Sect. 45 (8) of the Act.

(*h*) *Cohen* v. *Hale*, 3 Q. B. D. 371.

(*i*) *Hopkins* v. *Ware*, L. R. 4 Ex. 268; 38 L. J. Ex. 147.

(*k*) *Eyre* v. *Waller*, 5 H. & N. 463; 29 L. J. Ex. 246.

(*l*) *Maltby* v. *Murrell*, 29 L. J. Ex. 377; 5 H. & N. 813.

who has obtained leave to defend under this statute is not confined to the defence set up in his affidavit (*m*).

Cancellation of bills and notes.—If the drawer of a cheque or bill tears it up with the intention of destroying it, but does it so imperfectly that the pieces are pasted together again so as to bear no marks of cancellation about them, the drawer will be responsible upon the instrument to a holder for value who has taken it without having any just cause for supposing that it had been cancelled. This has been held to be the case where the appearance of the instrument was consistent with its having been divided into two parts for the purpose of safe transmission through the post, and where it was believed to have been so divided by the plaintiff who received it (*n*). See sect. 63 of Bills of Exchange Act in Appendix.

Proof of want of consideration.—A bill or note, given in consideration of what is supposed to be a debt, is without consideration, if it appears that there was either a mistake in law (*o*) or in fact (*p*) as to the existence of the debt, and there has been no indorsement or transfer of the instrument for value. But, where there is no mistake either in law or in fact, but a claim has been made by the plaintiff on the defendant, to which the defendant thinks he is not liable, but which claim the plaintiff is about to enforce by action, and the parties agree to a compromise, and the defendant gives his promissory note to the plaintiff for the payment of a certain sum, there is a good consideration for the note, and the instrument cannot afterwards be avoided on the ground that there was no valid claim against the defendant, and no cause of action against him at the time of the compromise (*q*). As to the onus of proof of consideration, see *ante*, p. 757.

Alterations in a bill or note avoiding the contract.—An alteration of a bill or note in a material particular (see now sect. 64 of the Act), after it has been negotiated, will avoid the contract, such as the addition to a promissory note for the payment of money with lawful interest, of the words " Interest at £6 per cent." written in the corner of the note, without the assent of the maker, after the note had been signed by him (*r*); the cutting off the signature of one of several joint promisors who have united together in undertaking a joint liability by their joint note of hand (*s*); the addition to the note of the name of a new promisor without the consent of the defendant (*t*); the acceleration of the

(*m*) *Saul* v. *Jones*, 1 El. & El. 59; 28 L. J. Q. B. 37.

(*n*) *Ingham* v. *Primrose*, 7 C. B. N. S. 82; 28 L. J. C. P. 295.

(*o*) *Southall* v. *Rigg*; *Forman* v. *Wright*, 11 C. B. 481.

(*p*) *Bell* v. *Gardner*, 4 M. & Gr. 23.

(*q*) *Cook* v. *Wright*, 30 L. J. Q. B. 321; *ante*, p. 12.

(*r*) *Warrington* v. *Early*, 2 Ell. & Bl. 763; 23 L. J. Q. B. 47; and see *Hirschfield* v. *Smith*, L. R. 1 C. P. 340; 35 L. J. C. P. 177.

(*s*) *Mason* v. *Bradley*, 11 M. & W. 598.

(*t*) *Gardner* v. *Walsh*, 5 Ell. & Bl. 91; 24 L. J. Q. B. 285.

time of payment of a bill of exchange by an alteration in the date of the bill and the time that it has to run (*u*), or the postponement of the date of payment of a cheque (*x*); an insertion of an incorrect date, where the bill bore no date upon the face of it (*y*); an alteration in the place of payment; or an insertion of some particular place of payment, without the privity and assent of the acceptor (*z*). As to a material alteration which is not apparent, see sect. 64 of the Act.

Immaterial alterations.—Whenever the alteration is immaterial, the substance of the contract remaining the same, the contract is not vitiated, although the alteration has been made by the plaintiff himself (*a*). Where, therefore, the date of a bill, payable three months after date, was altered from the 2nd to the 22nd of March, it was held, as between the indorsee and the acceptor, that the alteration was an immaterial alteration, the time of payment not being accelerated (*b*). Where a promissory note expressed no time for payment, and, while it was in the possession of the payee, the words "on demand" were added without the assent of the maker, it was held, in an action by the payee against the maker, that, as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did not affect the validity of the instrument (*c*). An alteration or addition, moreover, to the contract, before it has been finally completed, made with the assent of the parties to be affected thereby, will not avoid the instrument, or render a fresh stamp necessary (*d*). Where a joint and several promissory note was altered after the two first makers had signed the instrument, but before the defendant had affixed his signature, it was held that the note was not vitiated as regarded the defendant, and that no fresh stamp was requisite (*e*). Where a bill was made payable on the 1st of January, and the person to whom it was directed struck out the word January, and inserted March, and then accepted the bill, and sent it to the drawer, who, perceiving the enlarged acceptance, struck out March and again inserted January, and at that time sent the bill for payment, which the acceptor refused, whereupon the holder of the bill again struck out January, and left the bill payable in March, as the acceptor had accepted it, it was held that the acceptor was responsible for the non-payment of the bill on the 1st of March, pursuant to his original accept-

(*u*) *Master* v. *Miller*, 4 T. R. 320; 5 T. R. 367; 1 Smith's L. C. 6th ed. 837; *Hirschman* v. *Budd*, L. R. 8 Ex. 171; 42 L. J. Ex. 113.

(*x*) *Vance* v. *Lowther*, 1 Ex. D. 176.

(*y*) *Harrison* v. *Cotgreave*, 4 C. B. 562.

(*z*) See now s. 64 (2) of the Act in App.; *Calvert* v. *Baker*, 4 M. & W. 417; *Tidmarsh* v. *Grover*, 1 M. & S. 735; *Desbrow* v. *Wetherby*, 1 Mood. & Rob. 438; *Crotty* v. *Hodges*, 5 Sc. N. R. 221; 4 M. & Gr. 561; *Burchfield* v. *Moore*, 23 L. J. Q. B. 261.

(*a*) *Aldous* v. *Cornwell*, *infra*.

(*b*) *Parry* v. *Nicholson*, 13 M. & W. 778.

(*c*) *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573; 37 L. J. Q. B. 201.

(*d*) *Fitch* v. *Jones*, 5 Ell. & Bl. 238; 24 L. J. Q. B. 293.

(*e*) *Wright* v. *Inshaw*, 1 Dowl. N. S. 802.

ance (*f*). Where the holder of a bill for value agreed to take a new bill, and a bill at three months was sent him, to which he objected, requiring a bill at two months, and the three was accordingly altered to two, and the bill made payable at two instead of three months, it was held that the alteration did not invalidate the bill (*g*).

Whenever the plaintiff has altered a bill or note so as to vitiate the security, and deprive the defendant of a remedy which he would otherwise have had upon the instrument against the parties whose names are upon the face of it, the plaintiff will not only be deprived of all right of action upon the bill, but he will also lose all remedy for the recovery of the debt for which the bill was given (*h*). But, if the defendant has assented to the alteration, and the security is vitiated for want of a new stamp, or the bill has been accidentally or ignorantly altered by the plaintiff, without any fraudulent intent, and the defendant's remedy against any other parties is not affected by the alteration, the plaintiff's right of action for the recovery of the debt on account of which the bill was given is not discharged (*i*). Where a sum of 250*l*. had been advanced to a banker upon the security of a promissory note, and the note was subsequently altered by the parties, and vitiated by reason of there being no fresh stamp, it was held that the 250*l*. might be recovered independently of the note, upon a common count for money lent (*k*). And, where the names of prior indorsers of a bill had been struck out by mistake, it was held that the erasure might be corrected (*l*). It lies upon the party suing upon a bill or note to account for any material alteration appearing upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument, or render a fresh stamp necessary (*m*), unless the making of the bill, as set out by the plaintiff, is admitted on the record, the defendant merely denying the indorsement to the plaintiff (*n*), or the alteration is immaterial, and does not affect the plaintiff's right of action (*o*).

If a bill of exchange or note is altered in any material particular, and the alteration is apparent (see sect. 64, *supra*, p. 780), the remedy of the *bonâ fide* holder for value is confined

(*f*) *Price* v. *Shute*, cited 4 T. R. 336.
(*g*) *Tarleton* v. *Shingler*, 7 C. B. 812.
(*h*) *Alderson* v. *Langdale*, 3 B. & Ad. 660.
(*i*) *Atkinson* v. *Hawdon*, 2 Ad. & E. 628; *Sloman* v. *Cox*, 1 C. M. & R. 471.
(*k*) *Sutton* v. *Toomer*, 7 B. & C. 416.
(*l*) *Wilkinson* v. *Johnston*, 5 D. & R. 412.
(*m*) *Knight* v. *Clements*, 8 Ad. & E. 215; *Henman* v. *Dickinson*, 5 Bing. 183; 2 M. & P. 289; *Clifford* v. *Parker*, 3 Sc. N. R. 238; *Cariss* v. *Tattersall*, *ib*. 257.
(*n*) *Sibley* v. *Fisher*, 7 Ad. & E. 446.
(*o*) *Earl of Falmouth* v. *Roberts*, 9 M. & W. 469; and even where the alteration is material, a written contract may be looked at to see the terms of a parol contract; *Pattinson* v. *Luckly*, *post*, p. 1238.

to a right to recover the consideration for the bill as between himself and the party from whom he received it. A similar remedy may be resorted to by each indorsee against his immediate indorser, till the party is reached through whose fraud or laches the alteration was made; and the loss must rest with him, as it was his duty to have preserved the instrument in its original state (p).

Loss of bills and notes.—By the 17 & 18 Vict. c. 125, s. 87, which is reproduced by sect. 70 of Bills of Exchange Act in Appendix, it is enacted that, in actions founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court, or a judge, to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument (q). If the bill or note was not originally negotiable, that is, payable to bearer or to order, the loss of it is no defence to an action upon the instrument (r). But, if a negotiable bill or note has been lost, the loss, if permitted to be set up, is an answer as well to an action upon the instrument as for the recovery of the debt for which it was given (s).

Damages recoverable on the dishonour of bills.—Where an action is brought by the holder of a bill of exchange, not being an accommodation bill, against the acceptor, and there has been a partial payment by the drawer of the amount due on the bill, the holder may nevertheless recover the whole amount of the bill from such acceptor; but he holds the difference between the amount of the bill and the total amount received from the acceptor and the drawer together, as a trustee for the drawer. If the bill is an accommodation bill, the holder can only recover from the acceptor the amount due, after giving credit for the payment (t). When a bill drawn and indorsed in England, and payable abroad, is dishonoured by the acceptor's non-payment, the holder is entitled to recover from the indorser the amount of the re-exchange, and not the amount he gave for the bill in England (u).

Damages for not meeting bills at maturity.—Where defendants, a banking company, had, under a special agreement, accepted the plaintiff's bills, but their bank broke before the bills arrived at maturity, and the plaintiffs arranged with another house to take up the bills, and paid commission, and also paid

(p) *Burchfield* v. *Moore*, 3 Ell. & Bl. 687; 23 L. J. Q. B. 263.

(q) *Noble* v. *The Bank of England*, 2 H. & C. 355.

(r) *Charnley* v. *Grundy*, 14 C. B. 614; 23 L. J. C. P. 121.

(s) *Hansard* v. *Robinson*, 7 B. & C. 95; *Crowe* v. *Clay*, 9 Exch. 608; 23 L. J. Ex. 150.

(t) *Cook* v. *Lister*, *ante*, p. 772.

(u) *Suse* v. *Pompe*, 30 L. J. C. P. 75; *Willans* v. *Ayers*, 3 Ap. Cas. 133. Sect. 57 of the Act.

the expenses of protesting the bills and of telegraphing, it was held that, although as a general rule in an action on a bill of exchange by an indorsee against the acceptor neither general nor special damages can be recovered, yet, under the above circumstances, the commission and other expenses were recoverable, as the reasonable and natural consequences of the defendants' breach of contract (*x*).

Specific appropriation of securities.—Securities held by an acceptor against his acceptances are available to the billholders if both drawer and acceptor become insolvent, on the ground that the equity of the drawer to the surplus produce of the securities after answering the demand upon them can only be accomplished by first satisfying the amount due on the bills (*y*). There must not only be an insolvency, but both estates must be in a course of judicial administration (*z*), and the mere fact that the acceptor or drawer, a joint-stock company, has been ordered to be wound up, is not sufficient proof of insolvency (*a*).

Where only one of the parties is within the jurisdiction of the court, and the other is not, the latter is still free to dispose of his property as he sees fit, and he may object to his property being appropriated in a particular manner, and may recall a previous direction respecting it (*b*).

In a transaction between principal and agent a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods is binding on the agent, and he cannot set up a general lien against such direction (*c*). But as between vendor and purchaser where bills are drawn by the vendor upon the purchaser, with directions to place them to the account of the shipment of goods, and the bills of lading are handed to the purchaser, there is no specific appropriation, but the goods pass by the bills of lading (*d*).

If the securities are not realised until after the billholder has proved against the estate, his proof must be reduced by the amount received from the securities, and any dividend received on the excess of the original over the reduced proof must be refunded (*e*).

Merchants frequently give directions that a bill given by them shall be provided for by a certain specified cargo by a certain ship, an agreement which is not in itself an equitable lien, but

(*x*) *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Ex. 92; 39 L. J. Ex. 41.

(*y*) *Ex parte Waring*, 19 Ves. 345; see *Banner* v. *Johnson*, L. R. 5 H. L. 157; *Ex parte Mann*, 5 Ch. D. 367; *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 Ap. Cas. 366; as to what amounts to a specific appropriation, see *Ex parte Banner*, 2 Ch. D. 278.

(*z*) *Ex parte General South American Co.*, L. R. 10 Ch. 635.

(*a*) *Hickie & Co.'s Case*, L. R. 4 Eq. 226.

(*b*) *Ex parte General South American Co.*, *supra*.

(*c*) *Frith* v. *Forbes*, 4 D. F. & J. 409.

(*d*) *In re Entwistle*, 3 Ch. D. 477.

(*e*) *In re Barned's Banking Co.*; *Ex parte Joint Stock Discount Co.*, L. R. 10 Ch. 198.

may be part of the evidence tending to show an intention to create one. So where the consignor had drawn bills in favour of Frith & Co., and wrote to the consignees about these bills in a manner showing an intention to give Frith and Co. an equitable interest in the cargo referred to, it was held that the cargo was effectually appropriated to meet the bills, and that Frith & Co. had a lien upon it in priority to the consignees' claim for the balance due to their general account as consignees (*f*).

But where the consignor and consignee were part owners of a cargo, and the consignor drew bills to his own order against the cargo, and indorsed them to the plaintiffs, who knew nothing about any letters giving them any lien, and the plaintiffs claimed a lien; it was held that they had no lien in priority to the consignees' general account. The mere fact that there appear upon a bill the words "which please place to cargo per A.," does not give the billholder a lien upon that cargo (*g*).

Parties to bills—Agents.—See sects. 26 and 91 of the Act in Appendix, and sect. 47 of Companies Act, 1862, *post*, 788. When the drawee is requested to pay a certain sum of money "on behalf," or "on account," of a named third party, and the drawee accepts in his own name on behalf of such third party, and the surrounding circumstances show that he had authority so to accept, and that he has bound such third party by his acceptance, he will not himself be personally liable upon his acceptance (*h*); but, if the bill is drawn upon him without qualification, and he accepts in his own name, he cannot exempt himself from the ordinary liability of an acceptor by saying that he accepts on behalf of some third party on whom the bill is not drawn (*i*). If a bill of exchange is addressed to several persons, and one of them alone accepts it, he is personally responsible upon the bill (*l*). Where a bill upon the face of it purports to be accepted "per procuration," that circumstance is a notice to whoever takes the bill that it has been accepted by an agent acting under an authority given to him by a principal; and the holder cannot maintain an action against the principal, if the authority has been exceeded (*m*).

Promissory notes by trustees, agents, &c.—See sect. 26 and sect. 89 of the Bills of Exchange Act in Appendix. If a party signs a promissory note whereby he promises in his own name to pay a sum of money on behalf of a third party, he will himself be personally responsible for the payment of the money (*n*), unless it

(*f*) *Frith* v. *Forbes*, 4 D. F. & J. 409; *Ranken* v. *Alfaro*, 5 Ch. D. 786, C. A.

(*g*) *Rocy & Co.* v. *Ollier*, L. R. 7 Ch. 695.

(*h*) *Leadbitter* v. *Farrow*, *ante*, p. 66.

(*i*) *Mare* v. *Charles*, 5 Ell. & Bl. 981; 25 L. J. Q. B. 119; *Nichols* v. *Diamond*, 9 Exch. 157; *ante*, p. 66.

(*l*) *Owen* v. *Van Ulster*, 10 C. B. 318.

(*m*) *Stagg* v. *Elliott*, 12 C. B. N. S. 373; 31 L. J. C. P. 260; *Eyre* v. *McDowell*, 14 Ir. C. L. R. 314. Sect. 25 of the Act.

(*n*) *Healey* v. *Story*, 3 Exch. 3; 18 L. J. Ex. 8; *ante*, p. 66.

plainly appears from the surrounding circumstances that he contracted as agent, and bound his principal by the contract (*o*). Parties who promise in their own names to pay money cannot exonerate themselves from personal liability by describing themselves as "trustees," "treasurers," "directors," or "secretaries" of a named charity, company, or association (*p*), or as "executors" (*q*). But, if the promise is, on the face of the note, expressed to be made by a principal, and the party whose signature is attached to it signs the name of the principal to the instrument, adding his own name only as agent, he will, as we have seen, incur no personal liability upon the note, provided he was duly authorised to act in the matter (*r*).

Bills of exchange and promissory notes by partners.—See sect. 23 of the Act in Appendix.—A partner in a mercantile or trading firm may draw, accept, or indorse bills of exchange and promissory notes in the trading name of the firm so as to bind the partnership, because the drawing, accepting, and negotiating bills and notes are usual and necessary for the purpose of carrying on the trade and business of a mercantile firm. But it is not every partnership which gives such an authority. Solicitors and professional men in partnership have no such power; nor have brokers who are in partnership for the mere purpose of obtaining orders on commission and dividing the expenses (*s*). Every one of the partners in a mercantile firm is liable upon such bills or notes, whether his individual name is or is not used in the collective name of the firm, and whether it does or does not appear upon the face of the instrument, and whether such partner is dormant and secret, or a known and active member of the co-partnership, and whether the proceeds of such bill or note are dedicated and applied to partnership purposes, or to the private use of the individual partner (*t*). Where one of the acting partners of a firm accepted a bill in the name of the firm to obtain a loan, and then applied the money to his own private use, it was held that a secret partner, not known at the time of the acceptance to be a partner in the firm, might be sued upon the bill (*u*). And, where a bill was indorsed by a partner in the trading name of the firm, it was held that a person not known to be a partner at the time of the indorsement might be sued upon the instrument (*x*). "There

(*o*) *Agg* v. *Nicholson*, 1 H. & N 165, 25 L. J. Ex. 348; *Lindus* v *Melrose*, 3 H. & N. 137; 27 L. J. Ex 327.

(*p*) *Price* v. *Taylor*, 5 H. & N 510; *Bottomley* v. *Fisher*, 1 H & C. 211, 31 L. J. Ex. 417; *Dutton* v. *Marsh*, L R 6 Q. B. 361; 40 L J. Q B 175.

(*q*) *Childs* v. *Monins*, 5 Moo. 282.

(*r*) *Buckley*, *ex parte*, 14 M. & W. 469; *Alexander* v. *Sizer*, L. R. 4 Ex. 102; 38 L. J. Ex 59, *ante*, pp. 63-67.

(*s*) *Yates* v *Dalton*, 28 L. J. Ex. 69; *Forster* v. *Mackreth*, L. R 2 Ex. 162.

(*t*) *Lloyd* v. *Ashby*, 2 B. & Ad. 23; *Brown* v *Kidger*, 3 H. & N. 858.

(*u*) *Wintle* v. *Crowther*, 1 Cr. & J. 316.

(*x*) *Vere* v. *Ashby*, 10 B. & C. 288.

may be partnerships," observes Lord Ellenborough, "where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any partners in the name of the firm or partnership" (*y*). But, if the taker or holder thereof knew at the time he received the bill or note that the transaction was not a partnership transaction, but the private affair and dealing of the single partner, the other members of the firm will not be liable thereon. The bill or note must, in order to bind the partnership, be made, accepted, or indorsed in the trading name of the firm, or in some adopted name, recognised and used by the partnership in its ordinary course of business; or, if made, accepted, or indorsed by the one partner in his own name, the drawing, acceptance, or indorsement must be expressed to be made by him for, and as the act of, the firm at large (*z*). Where a signature to a bill is common to an individual partner and to the firm, a *bonâ fide* holder for value without notice has not the option to sue either the individual or the firm. The presumption is that the bill was given for the firm, but this may be rebutted, and if so it is immaterial that the holder took it as the bill of the firm (*a*). Where a member of a firm has no authority to bind his partners by drawing or accepting bills, he cannot bind them by giving a post-dated cheque (*b*).

Where a bill of exchange was drawn upon a firm, and accepted by one of the partners in his own name, it was held that he must be understood to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn (*c*). Thus, where a bill of exchange was addressed to "James Masterman and Co.," and was accepted by James Masterman only, without he words "and Co.," it was held that the acceptance was the acceptance of the firm, and that all the partners were liable upon it (*d*). If, however, the bill or note is drawn, or made, or accepted, or indorsed by the one partner in his own name only without mention of the partnership, and without its being expressed on the face of the instrument that the drawing or making, acceptance or indorsement, is made or done for the firm, the one partner whose name appears upon the instrument is the only person who can be sued thereon, although the proceeds thereof have been applied to the joint purposes of the firm, unless the partnership has been in the habit of paying bills and notes so

(*y*) *Swan* v. *Steele*, 7 East, 213; *Thicknesse* v. *Bromilow*, 2 Cr. & J. 425.

(*z*) *Smith* v. *Jarves*, 2 Raym. 1484; *Galway* v. *Matthew*, 1 Camp. 402; *Hall* v. *Smith*, 1 B. & C. 407.

(*a*) *Yorks. Banking Co.* v. *Beatson*, 5 C. P. D. 109, C. A.

(*b*) *Forster* v. *Mackreth*, L. R. 2 Ex. 162.

(*c*) *Mason* v. *Rumsey*, 1 Camp. 385, but see now s. 23 of the Act in App.

(*d*) *Wells* v. *Masterman*, 2 Esp. 730.

made and negotiated, and has consequently adopted the name of the partner as the name of the firm in bill transactions (*e*). If the firm carries on business in the name of an individual partner, his acceptance or indorsement will be treated as the acceptance or indorsement of the firm; and all the partners, consequently, will be liable upon the instrument (*f*). The plaintiff pressed C., his partner, for payment of a debt, and C. gave him two bills purporting to be accepted by the defendant's firm, and the plaintiff at first believed they were so accepted; in fact, one partner had accepted without the authority of the other. There was no drawer's name, and the plaintiff subsequently knowing something was wrong, and therefore knowing that he had no authority, filled in the name of his own firm. It was held he could not recover on the bills against the partner who had not authorised the acceptance (*g*).

A partnership may have divers trading names, by the use of any one of which by one of the partners it may be bound. If a firm has been in the habit of paying bills and notes, made, accepted, or indorsed in a name which is not the ordinary trading name of the co-partnership, it will be deemed to have given an implied authority to such partner to use such name, as the name of the firm, in bill transactions, and will be as much bound thereby as if the ordinary trading name of the firm had been made use of (*h*). If a dormant or secret partner has contracted in the name of the firm, or in an adopted name, he may be sued in his real name (*i*). When any one of the partners has accepted a bill of exchange, or indorsed a promissory note, in a name differing from the ordinary trading name of the firm, the proper question for the jury is whether the name used, though inaccurate, substantially describes the firm, or whether it so far varies that the acceptor or indorser must be taken to have accepted or issued the bill or note on his own account, and not in the exercise of his general authority as a partner (*k*).

Bills and notes by trustees or directors of co-partnerships.—In order to render the shareholders or co-partners liable upon bills of exchange or promissory notes, accepted, made, or indorsed by the trustees or directors in the trading name of the

(*e*) *Emly* v. *Lye*, 15 East, 7.

(*f*) *South Carolina Bank* v. *Case*, 8 B. & C. 436; and see *Stephens* v. *Reynolds*, 5 H. & N. 513; 29 L. J. Ex. 278.

(*g*) *Hogarth* v. *Latham*, 3 Q. B. D. 643.

(*h*) *Williamson* v. *Johnson*, 1 B. & C. 146.

(*i*) *Ball* v. *Gordon*, 9 M. & W. 345, 347.

(*k*) *Faith* v. *Richmond*, 11 Ad. & E. 339; *Kirk* v. *Blurton*, 9 M. & W. 289; *Norton* v. *Seymour*, 3 C. B. 792; *Stephens* v. *Reynolds*, 5 H. & N. 517; 29 L. J. Ex. 278.

co-partnership, it must be made out affirmatively by the parties suing upon such bills or notes that the directors had either an express or an implied authority to bind the other members by drawing, accepting, or making, or indorsing bills and notes, either by showing that companies instituted for similar purposes have constantly been in the habit of vesting such a power in the hands of their directors, or that it was absolutely necessary for the purpose of carrying on the concern that such a power should be placed in their hands (*l*). If the directors are authorised to issue bills, they must be drawn in conformity with mercantile custom and usage (*m*).

Bills and notes by corporations.—See sects. 22 and 91 (2) of Bills of Exchange Act, 1882, in Appendix.—When a corporation is established for trading purposes, it is from its nature capable of drawing a bill of exchange, and making the promise implied by law from making a bill, and is liable to be sued on the bill (*n*).

Bills of exchange and promissory notes by registered companies.—By the 25 & 26 Vict. c. 89, s. 47, it is enacted, that a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed, on behalf of the company, if it has been made, accepted, or indorsed in the name of, or by or on behalf or on account of, the company by any person acting under the express or implied authority of the company. This section does not confer on all companies registered under the Act the power of issuing bills of exchange, such a power only existing where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred (*o*). A promise by directors in their own names on behalf of the company will be binding on the company under this section, and will not, if the directors were duly authorised to make the promise, render them personally responsible (*p*). But, if any director, manager, or officer of any registered limited company, or any person on its behalf, signs, or authorises to be signed, on behalf of such company, any bill of exchange, promissory note, indorsement, cheque, or order for money or goods, or issues, or authorises to be issued, any bill of parcels, invoice, receipt, or letter of credit of the company, wherein the name of the company is not mentioned with the word "limited" after it, he is (s. 42) personally

(*l*) *Dickinson* v. *Valpy*, 10 B. & C. 137; *Steele* v. *Harmer*, 14 M. & W. 831.

(*m*) *State Fire Ins. Co.*, 32 L. J. Ch. 300.

(*n*) *Murray* v. *East India Co.*, 5 B. & Ald. 204.

(*o*) *Peruvian Ry. Co.* v. *Thames and Mersey Marine Ins. Co.*, L. R. 2 Ch. 617; 36 L. J. Ch. 864.

(*p*) *Lindus* v. *Melrose*, 3 H. & N. 177; 27 L. J. Ex. 327; *Aggs* v. *Nicholson*, 1 H. & N. 165; 25 L. J. Ex. 348; *Forbes* v. *Marshall*, 11 Exch. 174; *Halford* v. *Cameron's, &c.*, 16 Q. B. 444; 20 L. J. Q. B. 160; *Edwards* v. *Cameron's, &c.*, 6 Exch. 269; *Alexander* v. *Sizer*, L. R. 4 Ex. 102; 38 L. J. Ex. 59.

liable to the holder of the bill, &c., for the amount thereof, unless the same is duly paid by the company (*q*). If the directors are, by the deed of settlement or articles of association, absolutely prohibited from borrowing money or issuing bills of exchange or promissory notes, the company cannot be made responsible upon bills or notes issued in defiance of the prohibition (*r*), unless the shareholders acquiesce in the proceeding, and do not call the directors to account (*s*). If bills or notes issued by directors in their own names on behalf of the company are drawn or made without authority, or are informally drawn, and are not, consequently, binding upon the company, the parties who have signed them will themselves be responsible upon them (*t*). When the directors are expressly authorised to accept bills or issue promissory notes on behalf of the company, the company will be bound if the authority is substantially acted upon. It need not be exercised in the very terms in which it is given, or be strictly or technically accurate in point of form (*u*); and, if there has been a plain departure from the terms of the authority, and the shareholders have acquiesced in it, the company will be bound (*x*). A proviso in a bill of exchange drawn by a joint-stock company, limiting the liability thereunder, is repugnant and void (*y*). Where a company is being voluntarily wound up, and there are four liquidators, one of them cannot, in the absence of any authority from the company, and solely upon the strength of a general resolution of his co-liquidators, accept bills on behalf of the company (*z*). The contract which a party transferring for value the property in a bill of exchange makes with the transferee is that he warrants that the bill having been accepted by the drawee shall, on being presented at the time it becomes due, be paid—that is, he engages as surety for the due performance by the acceptor of the obligations which the latter takes upon himself by the acceptance. The liability of the transferor therefore is to be measured by that of the acceptor, whose surety he is; and, as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be the obligations of the surety (*a*).

(*q*) *Penrose* v. *Martyn*, 28 L. J. Q. B. 28; Ell. Bl. & Ell. 499.

(*r*) *Balfour* v. *Ernest*, 5 C. B. N. S. 601; 28 L. J. C. P. 170.

(*s*) Martin, B., *Forbes* v. *Marshall*, 11 Exch. 179.

(*t*) *Penkivil* v. *Connell*, 5 Exch. 381: *Dutton* v. *Marsh*, L. R. 6 Q. B. 361; 40 L. J. Q. B. 175.

(*u*) *Thompson* v. *Wesleyan Newspaper*, *&c.*, 8 C. B. 861; *Land Credit Company of Ireland, in re*, L. R. 4 Ch. 460; 40 L. J. Ch. 341.

(*x*) *Allen* v. *Sea, &c., Co.*, 9 C. [illegible]; 19 L. J. C. P. 305.

(*y*) *State Fire Ins. Co., in re, ex parte Meredith*, 32 L. J. Ch. 300; see sect. 3 of Bills of Exchange Act in App.

(*z*) *London and Mediterranean Bank, in re*, L. R. 5 Ch. 567; 40 L. J. Ch. 26; *Re London & Mediterranean Bank, ex parte Birmingham Banking Co.*, L. R. 3 Ch. 651; 36 L. J. Ch. 807; *London and Mediterranean Bank, in re, ex parte Agra & Masterman's Bk.*, L. R. 6 Ch. 206.

(*a*) *Rouquette* v. *Overmann*, L. R. 10 Q. B. 525; see sect. 73 (3) & (5) of the Act.

Where a bill payable in a foreign country is drawn and indorsed in this country, the sufficiency of the notice of dishonour depends on the law of the place of payment (*b*).

Conversion of bills and notes.—A man who holds a bill of exchange for a particular purpose has no right, without authority, to go and receive money on the bill, and if he does so, he is responsible for a conversion of the instrument (*c*). If, therefore, a bill of exchange or negotiable security is delivered into the hands of an agent or mandatory, that he may get it discounted, and he neglects to do so, and pays away the bill or note in furtherance of his own purposes, he is responsible for a conversion of the security (*d*); but if he pursues the authority given him, and gets the bill discounted, but misapplies the proceeds, he is not responsible for the conversion of the security, but for the misapplication of the money (*e*).

Conversion of lost or stolen bank-notes or negotiable securities.—If a bill of exchange, bank-note, or promissory note is lost, and the finder refuses to deliver the instrument to the owner on demand, he is guilty of a conversion of it, and is responsible in damages to the extent of the full value of the security. If the instrument is payable to bearer, and the finder, before any demand is made upon him, delivers the note to another, he is exempt from all further responsibility in respect of it (*f*). If the person to whom it is transferred took the note with knowledge of the infirmity of the title of the person from whom he received it (*g*), or if it is transferred to him for the mere purpose of enabling him to sue upon it, and he has given no value for the instrument, he will have no better title than the person from whom he has received it (*h*), and will be responsible for a conversion if he fails to deliver it up to the owner on demand. But if he is a *bonâ fide* holder for value, and took and discounted the note without any knowledge that the person from whom he received it had no title to it, he becomes the lawful owner of the instrument, and may retain it or pay it away (*i*). If he has given full value for the instrument, that is in general conclusive evidence of *bonâ fides*. If, on the other hand, he has paid a small sum for a bank-note of large value, payable on demand, that would be evidence the other way (*k*). The whole burthen of impeaching the title of the holder

(*b*) *Rothschild* v. *Currie*, 1 Q. B. 43; *Hirschfield* v. *Smith*, L. R. 1 C. P. 340; *Horne* v. *Rouquette*, 3 Q. B. D. 514, C. A.

(*c*) *Alsager* v. *Close*, 10 M. & W. 583.

(*d*) *Cranch* v. *White*, 1 B. N. C. 414; *Atkins* v. *Owen*, 4 Ad. & E. 819.

(*e*) *Palmer* v. *Jarmain*, 2 M. & W. 282.

(*f*) *Canot* v. *Hughes*, 2 Bing. N. C. 448. See Add. on Torts, 5th ed. by Cave, p. 466.

(*g*) *Burn* v. *Morris*, 2 Cr. & M. 579.

(*h*) *Bailey* v. *Bidwell*, 13 M. & W. 73.

(*i*) *Miller* v. *Race*, 1 Burr. 452; 1 Smith's L. C. 6th ed., 468; *Grant* v. *Vaughan*, 3 Burr. 1524; *Lawson* v. *Weston*, 4 Esp. 57; see sects. 29 & 38 of the Act.

(*k*) *Raphael* v. *Bank of England*, 17 C. B. 173.

of the instrument falls upon the plaintiff, who disputes that title (*l*). It is not enough for him to show that he lost the instrument, or that it has been stolen from him, and that immediately after the loss or the robbery it was found to be in possession of the defendant (*m*). The latter is not bound, from proof of those circumstances alone, to account for his possession of the security (*n*). But if the note is one of unusual value, and is found in the possession of the defendant immediately after the loss, and he declines to say from whom he received it, or to give reasonable information of the circumstances under which he became possessed of it, he would be required to prove that he gave value for the instrument (*o*); and if it was payable to bearer on demand, and he gave much less than its real value, and took it from a total stranger, without making any inquiry, and under circumstances which ought to have aroused suspicion in the mind of any prudent person, this will be evidence to show that he took it with knowledge of the infirmity of the title of the person from whom he received it, and to fix him with that infirmity of title. Gross negligence and want of caution are not in themselves sufficient to defeat the title of the holder, where he has given value for the security (*p*); but gross negligence may be evidence of *mala fides*, though it is not the same thing (*q*). With respect to crossed cheques, it is enacted by the Crossed Cheques Act, 1876 (*r*), sect. 12, that a person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

In the case of stolen notes, if the possession is recent, and the surrounding circumstances such as to show that the defendant stole the note, or received it into his possession knowing it to have been stolen, the plaintiff cannot maintain his action unless he has prosecuted for the felony. In all cases he should use diligence to apprise the public of his loss (*s*).

(*l*) *Worc. Co. Bank* v. *Dorch. & Milt. Bank*, 10 Cush. 489; *Wyer* v. *Dorch. &c. Bank*, 11 Cush. 51; see sect. 30 of the Act.

(*m*) *Miller* v. *Race*, *supra*.

(*n*) *King* v. *Milson*, 2 Camp. 5.

(*o*) *Bailey* v. *Bidwell*, 13 M. & W. 76.

(*p*) Bayley, J., *Backhouse* v. *Harrison*, 5 B. & Ad. 1105; *Raphael* v. *Bank of England*, 17 C. B. 161, overruling *Snow* v. *Leatham*, 2 C. & P. 317; *Snow* v. *Peacock*, 11 Moore, 286; 3 Bing. 406; and *Easley* v. *Crockford*, 3 M. & Sc. 701; 10 Bing. 243.

(*q*) *Goodman* v. *Harvey*, 4 Ad. & E. 876; *Arbouin* v. *Anderson*, 1 Q. B. 504.

(*r*) See *ante*, p. 373.

(*s*) *Beckwith* v. *Corrall*, 11 Moore, 337; 3 Bing. 444.

CHAPTER VI.

CONTRACTS OF ASSOCIATION.



SECTION I.

CONTRACTS OF PARTNERSHIP.

Participation in profits constituting a partnership.—Any number of persons not exceeding ten in the case of a bank or twenty in other cases (*a*) may constitute themselves partners by associating together and contributing in equal or unequal proportions money, labour, skill, care, attendance or services, to be employed in lawful commerce or business, upon the express or implied understanding that they are to share in certain proportions the profit and loss of the transaction (*b*). Where there is a community of profits in a definite proportion the fair inference is that the losses are to be shared in the same proportion (*c*). The contract is founded on the consent of the parties, and may be created and established by their acts and deeds, and their common participation in the profit and loss of a trade or business, or of a particular speculation or adventure, as well as through the medium of an express contract of co-partnership. If one man joins another in the furtherance of a particular undertaking, and contributes work and labour, services and skill, towards the attainment of the common object, upon the understanding that the remuneration is to depend upon the realisation

(*a*) 25 & 26 Vict. c. 89, s. 4. "No company, association, or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking unless it is registered as a company under this Act or is formed in pursuance of some other Act of Parliament or of letters patent; and no company, association, or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business which has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof (*Sykes* v. *Beadon*, 11 Ch. D. 170; (disapproved of in *Smith* v. *Anderson*, 15 Ch. D. 247; but see *In re Padstow Total Loss Ass.*, 20 Ch. D. 137; *Jennings* v. *Hammond*, 9 Q. B. D. 225) unless it is registered as a company under this Act or is formed in pursuance of some other Act of Parliament or of letters patent or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries."

(*b*) *Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter singulos pro ratâ dividatur.* Puff. Lex. Nat., l. 5, ch. 8, s. 1.)

(*c*) *In re Albion Life Assurance Soc.*, 16 Ch. D. 87, *per* Jessel, M. R.

of profits, so that if the business is a losing business he is to get nothing, he stands in the position of a partner in the undertaking, and not in that of a labourer or servant for hire (d).

Participation in profits not making the participators partners.—A person who merely receives out of the profits the wages of labour, or a commission as a hired servant or agent, such as a factor, foreman, clerk, or manager, and who has no interest or property in the capital stock of the business, is not a partner in the concern, although his wages may be calculated according to a fluctuating standard, and may rise and fall with the accruing profits (e). Thus, the captain of a vessel who has no interest in the ship or cargo is not a partner with the joint adventurers in the profit and loss of the voyage, although his wages are proportioned to the amount of profit realised (f). Where the owner of a colliery employed a man as captain of one of his barges to carry out and sell coal, and allowed him two-thirds of the price for which he sold the coals, after deducting the price charged at the colliery and the wages and pay of the crew, it was held that, as the captain had no interest or right of property either in the boat or the coals, he was merely a servant of the owner, and not a partner with him in the coal trade (g). So, where an apothecary assigned his business on the terms that he was to continue to reside on the premises, and attend to the practice, and receive one moiety of the clear profits of the business at the expiration of the year, it was held that this did not create a partnership during the year between the parties, but that it was merely a mode of paying the plaintiff for his services (h). So, in the French law, when a merchant, instead of a fixed salary, agrees to give his agent a certain proportion of the profits, the agent is not considered, on that account, to be a partner with the merchant; and, when one person consigns goods to another to be sold, under an agreement that the consignee shall have a certain portion of the proceeds of the sale, the consignee is not, on that account alone, to be considered a partner (i). So, when persons unite together for the purpose of carrying on a common undertaking, and some of them find the money, stock, and equipments necessary to carry it on, whilst others merely contribute labour in

(d) *Green* v. *Beesley*, 2 Sc. 169; 2 Bing. N. C. 108; *Barry* v. *Nesham*, 16 L. J. C. P. 21; 3 C. B. 641; *Moore* v. *Davis*, 11 Ch. D. 261.

(e) 28 & 29 Vict. c. 86, s. 2.

(f) *Pott* v. *Eyton*, 3 C. B. 32; 15 L. J. C. P. 257; *Andrews* v. *Pugh*, 24 L. J. Ch. 58; *Dry* v. *Boswell*, 1 Campb. 329; *Mair* v. *Glennie*, 4 M. & S. 244; *Harrington* v. *Churchward*, 29 L. J. C. 521.

(g) *Hartley's Case*, Russ. & Ry. 141; *Reg.* v. *Wortley*, 15 Jur. 1137; *Stocker* v. *Brockelbank*, 20 L. J. Ch. 401; *Hesketh* v. *Blanchard*, 4 East, 144.

(h) *Rawlinson* v. *Clarke*, 15 L. J. Ex. 171; 15 M. & W. 292.

(i) Pardessus, Droit Commercial, No. 969; Duvergier, Droit civ. tom. 5, No. 48, 56.

enter into partnership with the plaintiff that, after the agreement and before breach, the defendant discovered that the plaintiff had, before the agreement, acted with fraud and dishonesty towards a former partner of the plaintiff in the conduct of the partnership business which had been carried on by the plaintiff and such partner, and that such fraudulent and dishonest acts were unknown to the defendant at the time of his entering into the agreement (*x*).

Specific performance of a contract for a partnership.—As a general rule, the court will not decree specific performance of a contract for partnership, whether for an indefinite or for a specified period (*y*). But, after a partnership has commenced, the court will carry into effect the articles of partnership (*z*).

Of a partnership in profits, but not in the capital stock.—There may be a partnership as regards the accruing profits of a business or joint speculation, when there is no partnership, nor even a community of interest, in the capital stock of the business. Thus, where several persons unite together for the purpose of carrying on the business of common carriers of passengers and goods, and one finds a coach, and the others divide the road into districts, and each horses and conveys the coach through his own district, finding his own horses, harness, stables and equipments, servants, and coachmen, and all things necessary for the purpose, there is no partnership in the stock in trade, although there is a partnership in the accruing profits (*a*). So (to cite an example from Pothier), if the separate owners of two cows agree to send their milk together to market, and sell it for their joint benefit, there is no partnership in the cows, although the parties are partners in the sale of the milk. And, if goods are sent to a broker to sell, under an agreement that he is to have half of whatever he can get for them beyond a certain amount, there is no partnership in the goods, although he is a partner with the owner in the sale (*b*). If an author and a publisher agree to publish and sell a work upon their joint account, and to divide the profits of the sale, and it is stipulated between them that the author shall write the book, and furnish a certain quantity of manuscript, and that the publisher shall print and publish it at his own expense, receive the produce of the sale, and, after deducting the expenses of the publication, divide the profits between himself and the author, there is no partnership in the unsold copies of the work, but only in the profits of the sale (*c*). In many cases, however,

(*x*) *Andrews* v. *Garstin*, 31 L. J. C. P. 15.

(*y*) *Scott* v. *Rayment*, L. R. 7 Eq. 112; 38 L. J. Ch. 48.

(*z*) *England* v. *Curling*, 8 Beav. 129.

(*a*) *Barton* v. *Hanson*, 2 Taunt. 51.

(*b*) *Smith* v. *Watson*, 2 B. & C. 401.

(*c*) *Wilson* v. *Whitehead*, 10 M. & W. 503.

where parties agree to manufacture a commodity to be sold on their joint account, the one finding the raw material, and the other the labour and skill necessary for the purpose, there is a partnership between them in the manufactured article itself, as soon as it is completed and made ready for sale, as well as in the profits of the sale (*d*).

Introduction of new partners.—A partner in a private commercial partnership (not being a public joint-stock company with transferable shares) cannot introduce a stranger into the firm as a partner without the consent of all the members of the co-partnership (*e*).

Contracts between the firm and one of the partners.—At common law if a plaintiff in an action against a firm in partnership upon a partnership contract was himself a member of the firm, the action was not maintainable; for, being himself liable as one of the partners upon all contracts binding upon the co-partnership, he was in principle, it was said, both plaintiff and defendant in the action, which could not be permitted (*f*).

This rule of law was often productive of great hardship and inconvenience, as it deprived a partner of all remedy at common law for the recovery of money lent or goods supplied to, or work done by him for the benefit, and at the request, of the firm, after he became a partner (*g*), unless he had taken care to obtain the individual and personal security of the other partners for the repayment of the money, or the price of the goods and the work (*h*); and he was, consequently, frequently driven into courts of equity for relief, where no technical difficulty was allowed to stand in the way of substantial justice (*i*). One of the absurd consequences of this rule was, that the partners in one house of trade could not maintain an action against a partner in another house of trade, upon contracts made between the co-partnerships, if one of the partners of either house happened, at the time of making such contracts, to be a partner in both houses, whether the action was brought in the lifetime of the common partner, or after his

(*d*) Puff. de jure nat. et gent. lib. 5, ch. 8, 514, ed. 1729.

(*e*) Domat, de la Société, tit. 8, s. 2, No. 5. *Ex parte Barrow*, 2 Rose, 225. "*Socius mihi esse non potest, quem ego socium esse nolui: quid ergo, si socius meus eum admisit, ei soli socius est.*" Dig. lib. 17, tit. 2, l. 19, 20.

(*f*) *De Tastet* v. *Shaw*, 1 B. & Ald. 669; *Neale* v. *Turton*, 12 Moore, 368; 4 Bing. 149; *Mainwaring* v. *Newman*, 2 B. & P. 120, 125; *Teague* v. *Hubbard*, 8 B. & C. 345.

(*g*) He was not of course precluded from suing in respect of money lent or work done before he became a partner; *Lucas* v. *Beach*, 1 Sc. N. R. 350.

(*h*) *Moffat* v. *Van Mullingen*, 2 B. & P. 124, n.; *Perring* v. *Hone*, 4 Bing. 28; 12 Moore, 146; *Neale* v. *Turton*, *ib.* 365; *Goddard* v. *Hodges*, 1 Cr. & M. 37; *Sharpe* v. *Cummings*, 14 L. J. Q. B. 10.

(*i*) By the Roman law every partner who incurred expenses in the common affairs of the firm was entitled to compensation out of the joint stock; Dig. 17, tit. 2, lex. 52, § 4; lex. 61.

decease (*k*). "In this respect," observes Story, J., "the Roman law, the law of France, and the law of Scotland, present a marked contrast to the common law" (*l*).

Contracts between partners individually in their own names.—But, if the contract, though made concerning the partnership affairs, and in furtherance of the joint undertaking, was the individual contract of the partners who were parties to it, the objection did not apply (*m*). Bills of exchange drawn by one partner on one or more of his co-partners individually, and accepted by any one or more of them individually in his or their own name or names, no mention being made of the firm, rendered the parties whose names appeared on the face of such bills individually liable to the payee, whether he was a partner with them in the firm or not, and whether the bill had or had not been drawn and accepted in respect of a partnership transaction, inasmuch as the contract was not, in such a case, the contract of the firm, but the contract of the individual partner or partners signing it (*n*).

Covenants and agreements between partners to contribute capital or labour to the joint stock of the co-partnership, or not to trade on their own account, entered into by them in their own names with each other, created, consequently, a binding obligation upon such partners. The covenant of each covenantor was, in contemplation of law, made with all the rest, excluding himself; and all the rest were joint against him; "for, if there be twenty partners, and one of them covenants with all the rest, he is in that respect several from them all, and they all joint against him" (*o*). And, as regarded simple contracts between partners in their own names individually for the formation of a joint stock, and a contribution of capital by each of them, any one of the partners neglecting to pay his proportion of the agreed capital might be sued by all the rest, as the contract was in like manner with all the rest, excluding himself, he being in contemplation of law several from them all in respect of his particular share of the joint contribution, and they all joint against him (*p*). If several of the partners signed an agreement, constituting one of their number a trustee for the whole body, and authorising him to sue for and receive their several contributions to the joint stock, each of the partners signing the agreement was liable to an action at the suit of the partner so appointed for not paying up his share of

(*k*) *Bosanquet* v. *Wray*, 6 Taunt. 597.

(*l*) Story on Partners, 323, n. 1; 345, n. 5.

(*m*) *Lomas* v. *Bradshaw*, 19 L. J. C. P. 273.

(*n*) Best, C. J., 12 Moore, 368; *Fox* v. *Frith*, 10 M. & W. 131; *Sifkin* v. *Walker*, 2 Campb. 307.

(*o*) *Thimblethorp* v. *Hardesty*, 7 Mod. 117; *Eccleston* v. *Clipsham*, 1 Saund. 153; *Vesey* v. *Mantell*, 9 M. & W. 325; *Saunders* v. *Johnson*, Skin. 401; *Spencer* v. *Durant*, Comb. 115.

(*p*) *Venning* v. *Leckie*, 13 East, 7.

the contribution (*q*). If two persons agreed to divide the profits of a joint adventure, and to bear equally the expenses of setting the scheme afloat, and one of them paid the whole expense, he might sue the other for a moiety of the charges he had incurred (*r*).

Where an author and a publisher undertook the publication and sale of a work for their joint benefit, the author agreeing to supply a certain quantity of manuscript, and the publisher agreeing to print and publish the work at his own expense, and to divide the profits with the author, and the latter, after a portion of the work had been printed, refused to complete it, the publisher might have maintained an action against him for the damage he sustained by reason of the non-performance of the contract (*s*).

Distribution of the profits of co-partnerships.—If a partner, having the general conduct and management of a partnership business, had covenanted in his own name with another partner, to render accounts, and divide profits in hand, an action was maintainable against him by the covenantee for not accounting (*t*); but there was no remedy against him at common law for not dividing the profits, so long as the partnership continued, and the trading transactions of the firm had not been brought to a close. If the partners resorted to the Court of Chancery for an account, they must by their bill have prayed for a dissolution (*u*). In the absence of any evidence, the presumption is that partners are equally entitled to the profits, and equally liable to bear the losses of the business (*x*).

Action by one partner against another for a balance found to be due on a settlement of accounts.—When the partnership was at an end, and all its trading transactions had been brought to a close, and an ascertained balance of profit remained in the hands of one of the late partners upon a general settlement of the accounts, an action was maintainable for the recovery of such balance (*y*).

Action for a share of the profit of a particular joint adventure.—Where partners had merely agreed to divide the profits of one joint adventure, and all outstanding debts and liabilities in

(*q*) *Brown* v. *Tapscott*, 6 M. & W. 123; *Radenhurst* v. *Bates*, 11 Moore, 429.

(*r*) *French* v. *Styring*, *ante*, p. 795.

(*s*) *Gale* v. *Leckie*, 2 Stark. 107.

(*t*) *Owston* v. *Ogle*, 13 East, 541.

(*u*) *Loscombe* v. *Russell*, 4 Sim. 10. By the Roman law an action by one partner against the others for an account operated as a dissolution of the co-partnership; Dig. lib. 17, tit. 2, lex. 65.

(*x*) *Collins* v. *Jackson*, 31 Beav. 645.

(*y*) *Foster* v. *Allanson*, 2 T. R. 479; *Rackstraw* v. *Imber*, Holt, N. P. C. 370; *Wray* v. *Milestone*, 5 M. & W. 21; *Jackson* v. *Stopherd*, 2 Cr. & M. 361; *Brierley* v. *Cripps*, 7 C. & P. 709; *Winter* v. *White*, 3 Moore, 674; *Henley* v. *Soper*, 8 B. & C. 16.

respect thereof had been satisfied and discharged; one of the partners might have brought an action for his share of an ascertained balance which had been received by another (z). But, if it appeared that the parties were continuing partners in trade, so that the profit upon one transaction might be absorbed by the losses upon other subsequent transactions, no action was maintainable for the balance of profit appearing upon any one particular statement of accounts respecting bygone transactions completed and done with (a).

Contribution between partners to the common loss.—The courts of common law professed to be utterly unable to investigate partnership accounts; and, therefore, whenever the right of contribution between partners depended upon the state of partnership accounts and dealings and the existence of a balance in hand, the claimant must have resorted to a court of equity for relief (b). But, when the partnership was at an end and the trading operations had been wound up and completed, a right to contribution as between those who had been lately partners existed. Thus, where a partnership business was brought to a close, and the accounts made out, and shown to the defendant, one of the partners, who promised to pay to the plaintiff his proportion of the loss, but failed so to do, it was held that the latter was entitled to recover it in an action on an account stated (c). And, if the partnership had been confined to a particular transaction and joint speculation, which had proved to have been a losing adventure, and one partner had been compelled to pay the whole loss, or more than his proper proportion of it, such partner might, if the joint undertaking had been brought to a close, and there were no open and unsettled accounts respecting the matter, and nothing more to be received in respect thereof, have maintained an action against his late co-partner in the business for his share of the contribution towards the common loss (d).

Particular transactions not connected with the general account of profit and loss.—General partners in trade are not precluded, as we have seen (*ante*, p. 797), from suing each other upon special contracts entered into with each other individually on their own private account, although such contracts might have been made concerning the partnership business, and were intended to promote the general prosperity of the co-partnership (e). If one partner,

(z) *Wilson* v. *Cutting*, 4 M. & Sc. 268; *Goodyear* v. *Simpson*, 15 M. & W. 16; 15 L. J. Ex. 191.

(a) *Fromont* v. *Coupland*, 9 Moore, 323; *Carr* v. *Smith*, 5 Q. B. 128—138; *ante*, p. 799.

(b) *Pearson* v. *Skelton*, 1 M. & W. 504; *Sadler* v. *Nixon*, 5 B. & Ad. Dig. lib. 17, tit. 2, lex. 57.

(c) *Brown* v. *Tapscott*, 6 M. & W. 123.

(d) *Burnell* v. *Minot*, 4 Moore, 34; *Holmes* v. *Williamson*, 6 M. & S. 158.

(e) *Coffee* v. *Brian*, 10 Moore, 345.

for example, lent money to another to be employed in the business, or pledged his own private credit to enable his co-partner to obtain money or goods for the purpose of making up his proportion of the contribution to the general stock, the partner who had so lent his money, or pledged his credit, had the same remedy against the co-partner in whose favour he had acted as any third party would have had (*f*). So, if one partner received money which properly belonged to his co-partner, and not to the partnership, and appropriated it by mistake to the use of the firm, he was responsible to the partner whose separate money it was for the re-payment to him of the amount (*g*). And, if one partner borrowed money from the firm, and by his promissory note promised one of the partners individually to re-pay the amount, he was liable upon the note, although the money, when recovered by the holder of the note, would be the money of the firm (*h*).

Purchases by one partner on behalf of the firm.—Where four partners carrying on the business of sugar-refining entrusted to one of them (who was a wholesale grocer) the duty of buying sugars on behalf of the firm, and the partner so employed sold to the firm his own sugars, making a profit to himself on his dealings and transactions, without the knowledge of his co-partners, it was held that the firm was entitled to the whole of this profit (*i*).

Fraudulent use of the co-partnership name.—If one partner has cheated his fellow-partners through the intervention of a promissory note, given by him in the name of the firm, the fellow-partners are entitled to recover against him the sum paid in satisfaction of the apparent debt of their own on the note created by his fraud on the partnership (*k*).

Contracts of partnership induced by fraud.—If a person has been induced by fraudulent representation by one or more of several partners to become a member of the firm, he is entitled to relief, and to have the contract set aside (*l*).

Injunction to prevent injury to the firm.—The court also will prevent one of several partners from doing acts tending to depreciate the value of the partnership property, and injuring the credit of the firm (*m*); and from disposing of the joint stock to his own private purposes, in fraud of his co-partner (*n*).

(*f*) *Elgie* v. *Webster*, 5 M. & W. 518; *Ex parte Notley*, 1 Mon. & Ayr. 429; *Helme* v. *Smith*, 5 M. & P. 744; 7 Bing. 714; *Hesketh* v. *Blanchard*, 4 East, 144.

(*g*) *Smith* v. *Barrow*, 2 T. R. 476.

(*h*) *Lomas* v. *Bradshaw*, 19 L. J. C. P. 273.

(*i*) *Bentley* v. *Craven*, 18 Beav. 75.

(*k*) *Cross* v. *Cheshire*, 7 Exch. 46; 21 L. J. Ex. 3.

(*l*) *Rawlins* v. *Wickham*, 3 De G. & J. 304; *Jauncey* v. *Knowles*, 29 L. J. Ch. 95.

(*m*) *Marshall* v. *Watson*, 25 Beav. 504.

(*n*) *Hartz* v. *Schrader*, 8 Ves. 317.

Of dissolution of partnership.—If no time has been limited for the dissolution of a general trading partnership, it is a partnership at will, and may be dissolved at the pleasure of any one or more of the partners (*o*). If the co-partnership has been contracted by parol, it may be renounced by parol; but, if it has been established by deed, the renunciation and disclaimer of it by the party who withdraws from the firm ought to be made by deed (*p*). If the partners have agreed that the partnership shall continue for a definite period, it can only be dissolved before the expiration of the term limited by the mutual consent of all the parties, or by the bankruptcy, outlawry, embezzlement, felony, or death of any one or more of them, or by the decree of a court (*q*). Where a partnership originally carried on under articles for a fixed term of years is continued after the expiration of the term without new articles being entered into, it becomes a partnership at will; and such only of the articles as are applicable to a partnership at will remain in force (*r*). Temporary illness or incapacity to transact business will not warrant an application to the court for the dissolution of such a partnership; but, if the illness or incapacity is long continued, or recovery appears to be hopeless, a dissolution will be decreed (*s*). Actual insanity of one partner is not in itself a dissolution of the partnership; but it is a good ground for a decree of dissolution (*t*). The partnership is dissolved by the death or insolvency of one of the partners, or by an act of bankruptcy followed up by adjudication, and also by assignment by any partner of his share and interest in the business. And a dissolution by one partner is a dissolution as to all; so that the affairs of the old concern must be wound up from the day of the retirement (*u*). If the deed of co-partnership contains a power of expulsion of any one or more of the partners upon certain contingencies, the power must be exercised with the most perfect good faith and fairness, and in strict conformity with the stipulations and provisions of the deed, every opportunity being given to the expelled partner to bring to the knowledge of his co-partners all the facts and circumstances necessary to enabl[e] [...]ecial them to make a just exercise of their power (*x*). A disso[...]ir own which is fraudulent as against the joint creditors m[...] made [...]mote [...]tner,

(*o*) *Pearce* v. *Lindsay*, 3 De G. J. & S. 139; *Shepherd* v. *Allen*, 33 Beav. 577.

(*p*) *Peacock* v. *Peacock*, 16 Ves. 49.

(*q*) *Smith* v. *Mules*, 9 Hare, 556; *Essell* v. *Hayward*, 29 L. J. Ch. 807; 30 Beav. 158; *Harrison* v. *Tennant*, 21 Beav. 482.

(*r*) *Clark* v. *Leach*, 32 Beav. 14; 32 L. J. Ch. 290; *Cox* v. *Willoughby*, 13 Ch. D. 863.

(*s*) *Leaf* v. *Coles*, 1 De G. M. [...] 174; *Whitwell* v. *Arthur*, 35 Beav[...]

(*t*) *Anon.*, 2 K. & J. 441; *Ro*[...] v. *Evans*, 30 Beav. 302; 31 L. [...] 265.

(*u*) Collier on Partnership, 6[...] 154.

(*x*) *Blissett* v. *Daniel*, 10 Hare, 4[...]; *Wood* v. *Wood*, L. R. 9 Eq. 190; see *Russell* v. *Russell*, 14 Ch. D. 471.

avoided (*y*). When a partnership is determined prematurely, if the incoming partner has paid a premium, he is entitled to have a proportionate part of the premium returned, except, first, where there has been an actual or implied release or waiver of the right to it; or, secondly, where there has been an actual or implied release of the right to be a partner, including such a deliberate and serious breach of the partnership contract as may be considered equivalent to a repudiation of it altogether (*z*). Where, therefore, the partner who has received the premium afterwards commits a breach of the partnership articles, and dissolves the partnership, or renders its continuance impossible, the court will not allow him to take advantage of his own wrong, but will decree a restitution of a portion of the premium paid; but, if the partner who has paid the premium commits a like breach and is himself the author of the dissolution, the court will not allow him to found a claim to the restitution of the premium upon his own wrongful act (*a*). On a bill to dissolve a partnership, and take the usual partnership accounts, although the partnership had been discontinued more than six years before the filing of the bill, the court directed the accounts to be taken, notwithstanding that the defendant insisted on the Statute of Limitations as a bar (*b*).

Distribution of the partnership property and effects.—If a house in which the partnership trade is carried on belongs to one of the co-partners, the right to the occupation of the premises by the other partners ceases as soon as the firm is dissolved, unless the house has been demised to the firm collectively (*c*). Upon the dissolution of a mercantile partnership by death of one of the partners, the property and effects of the co-partnership do not belong exclusively to the survivors, but to the survivors and the representatives of the deceased partner, and are distributable between them in the same manner as they would have been by dissolution of the partnership *inter vivos*. The surviving partners have no *jus disponendi* of the partnership property and effects, as against the personal representatives of the deceased, except for the purpose of paying debts due from themselves and the deceased at the time of the death of the latter. They cannot mortgage the share of the deceased together with their own shares of the partnership property to enable them to pay debts and continue the trade (*d*); but they may become purchasers of the share of the deceased partner from his personal representatives (*e*).

(*y*) *Ex parte Mayou*, 34 L. J. Bank.

(*z*) *Wilson* v. *Johnstone*, L. R. 16 Eq. 606; 42 L. J. Ch. 668; *Bluck* v. *Capstick*, 12 Ch. D. 863.

(*a*) *Atwood* v. *Maude*, L. R. 3 Ch. 369.

(*b*) *Miller* v. *Miller*, L. R. 8 Eq. 499.

(*c*) *Benham* v. *Gray*, 5 C. B. 141.

(*d*) *Buckley* v. *Barber*, 6 Exch. 180; 2 L. J. Ex. 117.

(*e*) *Chambers* v. *Howell*, 11 Beav. 6.

If partners have purchased land merely for the purpose of carrying on their trade, and have paid for the land out of the partnership funds, the transaction makes the land partnership property, and the court will deal with it as personalty, and the share of a deceased partner therein will pass to his personal representatives (*f*). But, where the land, and not the trade, is the principal object, and the trade is merely ancillary to the beneficial enjoyment of the land, this doctrine will not apply (*g*). Partnership stock includes the good-will of the business and the right to use the trade-mark; and, on the purchase by a surviving partner from the executors of a deceased partner of the partnership stock at a valuation, the value of the good-will and of the trade-mark must be taken into account (*h*). In taking the accounts of a partnership, interest after the dissolution will not in general be allowed to the partners on their respective capitals, though interest during the partnership with annual rests is allowed (*i*). Nor in the absence of special agreement will interest be allowed on the profits left by a partner in the business (*k*). Where after the expiration of the articles, B. carried on the business with A.'s capital (who was dead), it was held that after making B. an allowance for carrying on the business, the profits must be divided between A.'s representatives and B., according to their respective amounts of capital (*l*).

Use of the name of the firm after dissolution or assignment.—After a partnership has been dissolved, each partner is entitled, in the absence of express agreement, to carry on business in the name of the old firm (*m*). And the assignment of the good-will and business will, it seems, include the exclusive right to use the name of the old firm (*n*).

Conversion of partnership property.—If one of two partners carries off the partnership property, and pledges it without the knowledge or assent of the other, this is not a conversion property by the pledgor, and does not render him liable sued by his co-partner, as he has a right to pledge to the of his limited interest, and to create a lien upon the partn property (*o*).

(*f*) *Darby* v. *Darby*, 3 Drew. 495; 25 L. J. Ch. 371.

(*g*) *Steward* v. *Blakeway*, L. R. 6 Eq. 479; *ib.* 4 Ch. 603.

(*h*) *Hall* v. *Burrows*, 33 L. J. Ch. 204.

(*i*) *Barfield* v. *Loughborough*, L. R. 8 Ch. 1; 42 L. J. Ch. 179.

(*k*) *Dinham* v. *Bradford*, L. R. 5 Ch. 519.

(*l*) *Yates* v. *Finn*, 13 Ch. D. 839

(*m*) *Banks* v. *Gibson*, 34 L. J. 591; 34 Beav. 566.

(*n*) *Levy* v. *Walker*, 10 Ch. D. 43

(*o*) *Jones* v. *Brown*, 25 Law J. 345; *Fenning* v. *Ld. Grenville*, 1 Ta 248; but he would, it seems, be ent to an action of account under the 4 A c. 16, s. 27; *Jacobs* v. *Seward*, L. R Eng. & Ir. Ap. 464.

SECTION II.

OF JOINT STOCK COMPANIES.

Joint stock companies.—The rights *inter se* of the members of a joint-stock company are regulated by the joint-stock companies' Acts and by the memorandum and articles of association. Where these are silent the ordinary law of partnership applies. A company created a corporation under the Companies Act, 1862 (*p*), is not thereby created a corporation with inherent Common Law rights. It is bound by its memorandum of association, which is its charter, and a contract made by its directors upon a matter not included in the memorandum is not binding on the company, even if assented to by the whole of the shareholders (*q*); but such things as are fairly incidental to those which the company are expressly authorised to do may be done (*r*).

General duties of directors.—There is, by law, without any special provision for the purpose, an implied and inherent term of the engagement or relationship subsisting between directors and shareholders, that directors shall use their best exertions in all matters relating to the affairs of the company, that they shall not make any profit to themselves out of their trust or employment, and that they shall not acquire to themselves, whilst they remain directors, any interest adverse to their duty (*s*). But their duty as directors may be controlled and qualified by the rules and objects of the society, and the nature and extent of the authority delegated to them by their shareholders (*t*). Directors of a company are not, as such, trustees any more than they are agents of those who deal with the company; they are the agents and in some respects trustees of the company and its shareholders, not of strangers dealing with the company by way of contract. They are merely agents of the company in respect of the contracts made between the company and strangers (*u*). If they make any profit on such contracts, the profit belongs to the company (*x*).

Liabilities of directors.—If the directors exceed their powers,

(*p*) 25 & 26 Vict. c. 89.

(*q*) *Ashbury Ry. Carriage Co.* v. *Riche*, L. R. 7 H. L. 653.

(*r*) *Atty.-Genl.* v. *Great Eastern Ry. Co.*, 5 Ap. Cas. 473; *In re West of England Bank*, 14 Ch. D. 317.

(*s*) *Benson* v. *Heathorn*, 1 Y. & C. Ch. C. 341; *Gaskell* v. *Chambers*, 26 Beav. 360; *Gt. Luxembourg Ry. Co.* v. *Magnay*, 25 ib. 586.

(*t*) *Bluck* v. *Mallalue*, 27 Beav. 404.

(*u*) *Ferguson* v. *Wilson*, L. R. 2 Ch. 77; *Wilson* v. *Lord Bury*, 5 Q. B. D. 518, C. A.; *Poole's case*, *infra*.

(*x*) *Liquidators of Imperial Credit Co.* v. *Coleman*, L. R. 6 H. L. 189.

tent to any single shareholder to apply for and obtain an injunction for the purpose of preventing the directors and the majority of shareholders of a registered company from entering into contracts for the carrying on a trade or business and the accomplishment of objects not warranted by the articles of association (*r*). The Court will restrain a public company, which by its deed of settlement was empowered to refuse to authorise a transfer to any person not approved by them, from refusing to transfer at all, though whether it would compel them to authorise a transfer of shares to a nominee of a rival company was considered doubtful (*s*). So the Court will restrain a railway company from paying dividends out of capital (*t*), or from prosecuting a suit not instituted by it (*u*).

The dissolution and winding up of registered joint-stock companies are regulated by the 25 & 26 Vict. c. 89 (*x*). In order to bring a society or association within the operation of the Act, it must be shown that it was formed for the purpose of trading and making profit. Clubs, therefore, in the ordinary acceptation of the term, are not within the scope and operation of the statute (*y*); but benefit building societies and friendly societies have been held to be within the repealed Acts for which the 25 & 26 Vict. c. 89, is substituted (*z*). The assets of a company which is being wound up must be applied in satisfaction *pari passu* of the liabilities of the company as they exist at the commencement of the winding up. Where therefore, prior to the winding up, a dividend had been paid under an inspectorship deed to some creditors of the company, but not to others, it was held that, there being no question of fraudulent preference, those who had not received any dividend were not entitled to a dividend under the winding up in priority to those who had (*a*). After a resolution for voluntary winding up, a shareholder cannot obtain a compulsory or supervisional order, except where the voluntary resolution has been obtained by fraud, or where creditors appear in support of the petition (*b*). When the business of the company has substantially ceased or become impossible the Court will order it to be wound up (*bb*).

(*r*) *Simpson* v. *Westm. Pal. Hotel Co. (Limited)*, 29 L. J. Ch. 561; 8 H. L. C. 712.

(*s*) *Robinson* v. *Chartered Bank*, L. R. 1 Eq. 32.

(*t*) *Bloxam* v. *Metrop. Ry. Co.*, L. R. 3 Ch. App. 337; *Salisbury* v. *Metrop. Ry. Co.*, 38 Law J. Ch. 249; see *Hoole* v. *Gt. West. Ry. Co.*, L. R. 3 Ch. App. 262.

(*u*) *Kernaghan* v. *Williams*, L. R. 6 Eq. Ca. 228; see *Abrahams* v. *Lord Mayor, &c., of London*, L. R. 6 Eq. 625; *Pickering* v. *Stephenson*, L. R. 14 Eq. 322.

(*x*) See also the 31 & 32 Vict. c. 68, and the 33 & 34 Vict. c. 104.

(*y*) *St. James's Club, In re*, 2 De G. M. & G. 388.

(*z*) *St. George's Benefit Building Soc., In re*, 27 L. J. Ch. 97; *Nat. Indust. & Prov. Soc., In re*, 30 L. J. Ch. 940; *Mid. C. Ben. Build. Soc., In re*, 33 L. J. Ch. 739.

(*a*) *Re Smith, Knight, & Co., Ex parte Ashbury*, L. R. 5 Eq. 223.

(*b*) *In re Gold Co.*, 11 Ch. D. 701.

(*bb*) *In re Haven Gold Co.*, 20 Ch. D. 151; *In re German Date Co., ib.*, 169.

Transfer or sale of property to another company.—By the 161st section of the Companies Act, 1862 (*c*), where a company is proposed to be or is being wound up, and its property sold or transferred to another company, the liquidators may receive shares, policies, &c., of the other company for the benefit of their company (*d*). It is no objection to an agreement between two companies under this section that it contains stipulations that the purchasing company shall take a portion only of the assets, or that the shares, &c., shall be given directly to the shareholders of the selling company, and not to the liquidator (*e*).

Parties liable to be made contributories.—By the 25 & 26 Vict. c. 89, s. 74, the term "contributory" is to mean every person liable to contribute to the assets of a company under that Act in the event of the same being wound up. By s. 75, the liability of any person to contribute to the assets of a company under that Act, in the event of the same being wound up, is to be deemed to create a debt of the nature of a specialty, accruing due from such person at the time when his liability commenced, but payable at the times when calls are made for enforcing such liability. By s. 38, in the event of a company under that Act being wound up, every present and past member of the company is to be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves. But no past member is to be liable to contribute to the assets of the company, if he has ceased to be a member for one year prior to the commencement of the winding up. No past member is to be liable to contribute in respect of any debt or liability of the company contracted after the time at which he ceased to be a member. No past member is to be liable to contribute to the assets of the company, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them. In the case of a company limited by shares, no contribution is to be required from any member exceeding the amount unpaid on the shares in respect of which he is liable as a present or past member. In the case of a company limited by guarantee, no contribution is to be required from any member exceeding the amount of the undertaking entered into on his behalf by the memorandum of association. The Act is not to invalidate any provision contained

(*c*) 25 & 26 Vict. c. 89, s. 161.

(*d*) There is a proviso as to dissentient members; and see s. 162, giving notice, as to which see *In re Union Bank of Kingston-upon-Hull*, 13 Ch. D. 808.

(*e*) *In re City Investment Co.*, 13 Ch. D. 475

in any policy of insurance or other contract, whereby the liability of individual members upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect thereof. No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise is to be deemed to be a debt of the company payable to such member, in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves. By the 30 & 31 Vict. c. 131, s. 4, where a company is formed as a limited company under the 25 & 26 Vict. c. 89, the liability of the directors or managers, or of the managing director, may, if so provided by the memorandum of association, be unlimited. By sect. 5, such director or manager, in addition to his liability to contribute as an ordinary member, is to be liable to contribute as if he were a member of an unlimited company. But no contribution required from any past director or manager who has ceased to hold such office for a period of one year, or required in respect of any debt or liability contracted after he ceased to hold such office, is to exceed the amount which he is liable to contribute as an ordinary member of the company; and, subject to the provisions contained in the regulations of the company, no contribution required from any director or manager is to exceed the amount which he is liable to contribute as an ordinary member, unless the court deems it necessary to require such contribution in order to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of the winding up. If the directors of a registered company have borrowed money, which has been applied *bonâ fide* to the purposes of the company, and the members or shareholders have had the benefit of the transaction, the loan constitutes a debt due from the company, in respect of which contribution may be enforced, although no express power to borrow money had been granted to the directors (*f*). All persons who have purchased shares and received dividends (*g*), or who have applied for, and accepted and received, an allotment of shares (*h*), or who have agreed to take shares and subscribe capital for the purpose of carrying on the undertaking, or are actually holders of shares in the company, are liable to be made contributories to the debts and liabilities of the company, whether they have executed the deed or signed the contract, or hold their shares, as trustees,

(*f*) *Elect. Tel. Co., In re*, 30 Beav. 225.

(*g*) *Barclay, Ex parte*, 27 L. J. Ch. 664

(*h*) *Best's case*, 34 L. J. Ch. 523; *Thomson's case, ib.* 525; *Cockney's case*, 28 *ib.* 12; *Worth, Ex parte, ib.* 589.

or in their own right, or as mortgagees or creditors (*i*). So the subscribers of the memorandum of association are bound to take as many shares as they have subscribed for, whether or not the shares are actually allotted to them, if there are shares in existence which can be attributed to them; and this objection cannot be dispensed with by the directors (*k*), nor is it satisfied by the allotment at a subsequent period of nominally fully paid up shares (*l*). But it does not necessarily follow that, because a man has claimed to be a member and has attended a meeting in that character, and has been registered and returned as a member by the directors, he can be made liable as a contributory to the debts of the company (*m*). If he has offered to accept shares, but has revoked his offer before it has been accepted, and before any shares have been allotted him, he cannot be made a contributory, although shares have been subsequently allotted to him, and his name has been placed on the register of members and returned to the registrar (*n*). So, if he has never been a shareholder at all, and there has never been any privity between him and the company, but he has simply purchased shares in the name of another person, who has been accepted as a shareholder by the company (*o*). So, if he has accepted shares conditionally, and has been registered as a member, he is nevertheless not liable to be placed on the list of contributories, if the condition annexed to his acceptance of the shares has never been fulfilled, and he has never signed the deed of settlement or any subscription contract (*p*). If, however, the members generally are neither party nor privy to the condition, if, for instance, it has been a mere private arrangement by the directors behind the backs of the members, the party cannot be relieved from the common burthen of the contribution (*q*). The register of members, therefore, is not conclusive evidence as to who are and who are not contributories, as the court can put those on the list of contributories who are not registered as members, and can strike out from the list of contributories those who are so registered (*r*). Although there are many irregularities in the mode of transfer, and the clauses of the deed of settlement are not carried

(*i*) *Holt, Ex parte*, 20 L. J. Ch. 413; *Gay, Ex parte*, 21 *ib.* 284; *Hall's case*, 3 De G. & S. 80; *Price's case*, *ib.* 146; *Lumsden* v. *Buchanan*, 4 Macq. H. L. Cas. 959. As to liability of trustees, see *Muir* v. *City of Glasgow Bank*, 4 Ap. Cas. 337; *Cunningham* v. *City of Glasgow Bank*, 4 Ap. Cas. 607; *Gillespie* v. *City of Glasgow Bank*, 4 Ap. Cas. 632; *Cree* v. *Somervail*, 4 Ap. Cas. 648; *Bell's case and other cases*, 4 Ap. Cas. 547, *et seq.*; as to executors, see *Buchan's case*, 4 Ap. Cas. 583.

(*k*) *Evans' case*, L. R. 2 Ch. 427.

(*l*) *Mingotti's case*, L. R. 4 Eq. 238; *Forbes & Judd's case*, L. R. 5 Ch. 270.

(*m*) *Electric Tel. Co.* v. *Bunn*, 29 L. J. Ch. 913.

(*n*) *Graham, Ex parte*, 30 L. J. Bk. 42.

(*o*) *King's case*, L. R. 6 Ch. 196; 40 L. J. Ch. 361.

(*p*) *Wood's case*, 3 De G. & J. 91; *Irish Peat Co.* v. *Phillips*, 1 B. & S. 598, 629; 30 L. J. Q. B. 363.

(*q*) *Nickoll's case*, 24 Beav. 641.

(*r*) *Post*, p. 1019.

out, yet a transferee may, by becoming recognized and acting as a shareholder, be estopped from denying his liability as such, and his transferor may cease to be liable as a contributory (s).

With respect to limited liability companies, it has been held that the shareholders may agree *inter se* to make themselves liable to a greater amount than the amount of their shares, and may be put on the list of contributories in respect of such amount although they are holders of fully paid-up shares (t). Although the shareholder's name may have been removed from the list for years, yet, if this was not done according to the terms of the deed of settlement, he is still liable to be put upon the list of contributories (u). As to female contributories, see s. 78 of the Companies Act, 1862, and see *Ex parte Hatcher*, 12 Ch. D. 284; and as to bankrupts and their trustees, see *Ex parte Budden*, 12 Ch. D. 288.

Calls on contributories constituting specialty debts.—The liability of any person to contribute to the assets of a company in the event of its being wound up is to be deemed a specialty debt due from such contributory to the company (x). But calls founded on colonial Acts create only simple contract debts (y). A shareholder in a limited company who is also a creditor of the company under a contract, is not, in the event of the company being wound up, entitled to set off the debt due to him against the calls, nor to set off against the calls a dividend which may hereafter come to him; but, upon payment of all calls which have become due, he is entitled to receive dividends at the same time as, and at the same rate with, the other creditors (z).

Fraudulent representations by directors inducing parties to become shareholders afford no valid ground, as regards creditors, for resisting the liabilities attaching to the ownership of shares (a). Parties having taken shares, and held themselves out as partners and shareholders, cannot, by repudiating their shares on the ground that they have been defrauded, make themselves no longer shareholders, and thus get rid of their liability to the creditors of a failing concern (b). But, although they may not be able to exonerate themselves from their liability to creditors who may have trusted the company on the faith of their being shareholders,

(s) *Murray* v. *Bush*, L. R. 6 H. L. 37.

(t) *Maxwell's case*, L. R. 20 Eq. 885; *McKewan's case*, 6 Ch. D. 447.

(u) *Spackman* v. *Evans*, L. R. 3 H. L. 171; *In re Esparto Trading Co.*, 12 Ch. D. 201.

(x) *Wentworth* v. *Chevill*, 26 L. J. Ch. 760.

(y) *Welland Ry. Co.* v. *Blake*, 30 L. J. Ex. 5; 6 H. & N. 410.

(z) *Grissell's case*, L. R. 1 Ch. 528; see also *In re Whitehouse & Co.*, 9 Ch. D. 595.

(a) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949; see *Holdsworth* v. *City of Glasgow Bank*, 5 Ap. Cas. 317; *Stone* v. *City Bank*, 3 C. P. D. 282, C. A. (voluntary winding up).

(b) *Henderson* v. *Royal Brit. Bank*, 7 Ell. & Bl. 364; *Daniel* v. *Roy. Brit. Bank*, 1 H. & N. 681; *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. App. 145.

yet, as between themselves and the other shareholders, they may, in certain cases, successfully resist a claim to enforce a contract for the purchase of shares, by showing that they had been drawn in to accept shares by the fraudulent representations or concealment of the directors (c) or the general body of shareholders (d). If the directors of a company prepare a document containing a false exposition of the state of the affairs of the company for the information of their own shareholders, and one of the directors exhibits the document to strangers, for whose perusal it was not intended, the other directors and the company are not bound by this unauthorised act, and are not responsible for the consequences thereof (e). And a misrepresentation of the effect of the deed of settlement by an officer of the company, will not release a shareholder, if it was no part of his functions to read, or explain, or expound the deed (f). By the Companies Act, 1867, s. 38, every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, must specify the dates and the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors or the company or otherwise; and any prospectus or notice not specifying the same is to be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.

Shareholders are never relieved from being contributories on the ground that they had taken their shares on the strength of false representations made by third parties, and not by the directors who allotted them the shares (g). And, whenever they rely on fraud as shielding them from liability on the partnership contract, they ought to show that, as soon as they became aware of the deception practised upon them, they repudiated their shares, and disclaimed all further connection with the undertaking; for, if, notwithstanding the fraud, they were content to remain partners and participate in profits, or in the chances of future profits, or attempt to sell the shares (h), they cannot avail them-

(c) *Roy. Brit. Bank, In re*, 30 L. J. Ch. 322; *Stewart's case*, L. R. 1 Ch. 574; 35 L. J. Ch. 738; *Ship's case*, 2 De G. J. & S. 544; *Reese River Co.* v. *Smith*, L. R. 4 H. L. 65.

(d) *Ayre's case*, 25 Beav. 513; *Glasgow Nat. Ex. Co.* v. *Drew*, 2 Macq. 103; *Mixer's case*, 28 L. J. Ch. 879; 4 De G. & J. 575, 583; *Bell's case*, 22 Beav. 40; *Blake, ex parte*, 34 L. J. Ch. 278; 34 Beav. 639.

(e) *Nicol's case, Royal Brit. Bank, In re*, 3 De G. & J. 440; *Bigg, ex parte*, 28 L. J. Ch. 50; *Worth, ex parte*, ib. 589.

(f) *Sheffield's case*, 28 L. J. Ch. 325.

(g) *Duranty's case*, 26 Beav. 271.

(h) *Briggs, ex parte*, L. R. 1 Eq. 483; 35 L. J. Ch. 520.

selves of the fraud (*i*). In a case of fraud amongst the directors, in making it appear that they were entitled to commence business when they were not entitled to do so, there may be a defence by shareholders sought to be made contributories; but, if business has been commenced, and every one of the shareholders has been made liable for a large amount to the creditors of the company, contribution to the common external liabilities cannot be resisted on the ground that the directors made a mistake or a miscalculation, and began business with less capital than they ought to have begun with (*k*).

Every co-contractor under a subscription contract has a right to say that it was on the faith of the capital being found in the manner prescribed by that deed that he concurred in the undertaking, and to insist that every person who has signed the deed has become liable as a shareholder to the full amount of the shares for which he has signed, and should be placed on the register of the shareholders; and any underhand agreement between the directors and any particular subscriber, to the effect that he shall not be called upon, and that his subscription shall be merely nominal, and shall be used only as a bait to draw others in to the scheme, is absolutely null and void (*l*).

The promoters of a company omitted from the prospectus two contracts entered into by them which were material to be known to intended shareholders, it was held (*m*) that the contracts ought to have been specified and (*n*) that the words "knowingly issuing," in section 38 mean intentionally issuing although under a *bonâ fide* belief that the contracts need not be specified (*o*). The shareholder has a right to stand upon his contract, and if he has done all that can be demanded of him under it he is not bound to do more and to inquire into whether all is fair and according to the provisions of statutes (*p*), but he cannot escape from his contracts or engagements by alleging that he was induced to enter into them by misrepresentation (*q*).

Fraudulent representations by promoters.—A lease of a phosphate of lime island was contracted to be sold to an agent for

(*i*) *Deposit Life Ass.* v. *Ayscough*, 6 Ell. & Bl. 763; 26 L. J. Q. B. 29; *Wilkinson's case*, L. R. 2 Ch. 536; 36 L. J. Ch. 489; *Whitehorne's case*, L. R. 3 Eq. 790; *Downe's case*, L. R. 5 H. L. 343; *Ashley's case*, L. R. 9 Eq. 263; *McNeil's case*, L. R. 10 Eq. 503.

(*k*) *Longworth's Executors, ex parte*, 29 L. J. Ch. ..; 1 De G. J. & F. 17.

(*l*) *Davidson's case*, 4 K. & J. 698.

(*m*) By Common Pleas Division, and by Cockburn, C. J., and Brett, L. J., diss. Kelly, C. B., and Bramwell, L. J., see *Sullivan* v. *Metcalfe*, 5 C. P. D. 555.

(*n*) By Common Pleas Division, and by Cockburn, C. J., Bramwell and Brett, L.JJ.

(*o*) *Twycross* v. *Grant*, 2 C. P. D. 469; see *Gover's case*, 1 Ch. D. 182, as explained by James, L. J., in *New Sombrero Co.* v. *Erlanger*, 5 Ch. D. 118.

(*p*) *Waterhouse* v. *Jamieson*, L. R. 2 Sc. App. 29.

(*q*) *Oakes* v. *Turquand, In re Overend & Gurney*, L. R. 2 H. L. 325.

some speculators (the promoters of the plaintiff company) and he agreed to sell it to a trustee for the plaintiff company for double the price; the speculators (promoters), and their agent suppressed the fact that they were the real vendors, and that the company was giving double the price, and inserted in the prospectus statements, leading shareholders to think the contract had been approved by five directors, which was untrue, and it was held that the promoters stood in a fiduciary relation to the company, and that the contract must be set aside (r). And where a fraudulent promoter has made a secret profit, he cannot be allowed to retain it (s).

Shares to be paid up in full.—By the 25th sect. of the Companies Act, 1867, it is provided that every share in any company shall be deemed to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the Registrar of Joint Stock Companies at or before the issue of such shares (t). Any *bonâ fide* transaction between a company and a shareholder, which if the company brought an action against him for calls would support a plea of payment is "payment in cash" within the above section (u), but although the transaction be *bonâ fide*, if what is done would not support a plea of payment, there never being any liability to pay in cash, the allottee of the shares is liable to be put on the list of contributories (x). Where shares have been allotted as fully paid up, and no contract has been registered under the above section, yet if the shares have been transferred by the allottee, without notice that they are not fully paid up, to strangers, such strangers can give a good title to them as fully paid-up shares to the purchaser, even if such purchaser be the original allottee (y).

If a company agree to pay in discharge of a debt by fully paid-up shares, they must either do so in fact or register a contract under section 25; and if they do not they are liable in damages for negligence, and the fact that the shareholder has the contract in his hands and omits to register is not it seems contributory negligence (z).

(r) *New Sombrero Phosphate Co.* v. *Erlanger*, 5 Ch. D. 73; 3 Ap. Cas. 1218; see *In re British Seamless Paper Box Co.*, 17 Ch. D. at p. 471; a case of a private company and no one deceived.

(s) *Bagnall* v. *Carlton*, 6 Ch. D. 371; *Emma Silver Mining Co.* v. *Grant*, 11 Ch. D. 918.

(t) 30 & 31 Vict. c. 131, s. 25; see *Burkinshaw* v. *Nicolls*, L. R. 3 Ap. Cas. 1004; *Anderson's case*, 7 Ch. D. 75; *De Ruvigne's case*, 5 Ch. D. 306; *Barrow's case*, 14 Ch. D. 432.

(u) *Spargo's case*, L. R. 8 Ch. 407; *In re Barrow-in-Furness Investment Co.*, 14 Ch. D. 400.

(x) *White's case*, 12 Ch. D. 511.

(y) *Barrow's case*, *supra*.

(z) *In re Government Security Co.*, *Mudford's claim*, 14 Ch. D. 634; *Great Australian Gold Co., ex parte Appleyard*, 18 Ch. D. 587; see however *Houldsworth* v. *City of Glasgow Bank*, 5 Ap. Cas. 317; *post*, p. 1177.

Limitation of the liability of contributories.—If several persons unite together in a joint undertaking or partnership, and in doing so contract between themselves that no one except the managers shall be liable beyond a given amount, this, although of no effect as regards strangers, is a perfectly valid and binding provision, limiting the liability of the shareholders as between themselves; and it is not in the power of any majority of the shareholders to bind a minority of them to any alteration of this provision. No single member of the company can, as between himself and his co-partners, be deprived of the benefit of this provision without his express consent (*a*). When the deed of settlement and the contracts of the company provide for the formation of a capital fund by subscriptions and shares to meet the debts and liabilities, and declare that the directors and shareholders shall not themselves be personally responsible in respect thereof, but that the fund alone shall be answerable, the shareholders cannot be called on to pay more than the amount of their several subscriptions to the capital stock (*b*), unless the party dealing with the company had no notice of the limitation of liability, and contracted in ignorance thereof (*c*). But the creditors are of course entitled to have the fund made available, and may enforce payment from the shareholders to the full amount of their subscriptions and shares (*d*).

With respect to the liability of joint-stock banks of issue, sect. 182 of the Companies Act, 1862, is repealed by the 42 & 43 Vict. c. 76, and they are not entitled to limited liability in respect of their notes, and the members continue liable in respect thereof as if such banks were registered as unlimited companies. And in the event of a winding up, in case the assets are not sufficient to satisfy the note-holders and the general creditors, the members after satisfying the note-holders shall contribute a sum equal to the amount received by the note-holders (*e*).

Release of the liability to contribute by a transfer of the shares.—All transfers of shares made after a winding-up order has been obtained must be shown to be *bonâ fide* transfers, not clothed with a trust for the benefit of the transferor, enabling him to rely on the transfer in the event of the company turning out ill, and to claim back the shares if it turns out well (*f*), nor mere colourable devices for shifting the liability attaching to the owner-

(*a*) *Bignold, ex parte*, 22 Beav. 150; 25 L. J. Ch. 603.

(*b*) *Athenæum Life Ass. Soc., In re*, 4 K. & J. 549; 28 L. J. Ch. 385; *Lethbridge* v. *Adams*, L. R. 13 Eq. 547.

(*c*) *Gordon* v. *Sea Fire, &c., Ins. Co.*, 1 H. & N. 599; 26 L. J. Ex. 202.

(*d*) *Cope, ex parte*, 20 L. J. Ch. 28; *Talbot, ex parte*, 16 Jur. 855.

(*e*) 42 & 43 Vict. c. 76, s. 6.

(*f*) *Chinnock's case*, 1 Johns. 717; *De Pass's case*, 28 L. J. Ch. 769.

ship of the shares from a responsible proprietor to a man of straw (g). If the consent of the directors is required to the transfer, that consent must be expressly or impliedly obtained (h). If the transferee has executed the ordinary form of transfer deed, and has covenanted or agreed to hold the shares upon the terms of the original deed of settlement or subscription contract, or upon the terms on which the transferor himself held them, the contribution due from him will be a specialty debt, and the company will be entitled to rank as specialty creditors upon his estate in respect thereof (i). Where one of the rules of a mining company enabled any of the shareholders to determine their liabilities on giving notice to the purser of their desire to retire, and depositing with him a transfer of their shares, and signing a relinquishment of all claims on the company in respect of their shares, it was held that shareholders who had complied with these formalities could not be made contributories in respect of the debts and liabilities of the company (k). But, in general, a shareholder who has transferred his shares, but whose transferee has not been registered in the share register book, will be liable to be made a contributory to the company, unless the proposed transferee has acted as the owner of the shares (l), or unless the non-registration of the transferee is owing to the default of the company (m).

All contracts and transactions between the directors and shareholders, which are to have the effect of allowing certain of the members to transfer their shares to the company and retire from the concern, without substituting the liability of any new members in their stead, apparently enabling shareholders who may have the command of money to escape from all further liability at the expense of their co-partners, are regarded with the greatest distrust, and will in general be invalid. If the transaction is not in truth a transfer within the intent and meaning of the statutory or authorised regulations, if, for instance, no substituted shareholder is introduced into the company, but the pretended transfer is a mere scheme between the directors and certain shareholders to enable those shareholders to withdraw from the liabilities and responsibilities of a failing concern, on giving up their shares to the company, in a mode which is not sanctioned

(g) *Mexican & South Amer. Co., in re*, 27 Beav. 465; 28 L. J. Ch. 628; 30 L. J. Ch. 113; *Budd, ex parte*, 31 L. J. Ch. 4; *Hutton, ex parte*, 31 L. J. Ch. 340; *Electric Telegraph Co., in re*, 30 Beav. 143; 31 L. J. Ch. 4; *Gilbert's case*, L. R. 5 Ch. 559; 39 L. J. Ch. 837.

(h) *Roy. Brit. Bank, in re*, 3 De G. & J. 433.

(i) *Hay v. Willoughby*, 22 L. J. Ch. 253.

(k) *Fenn, ex parte*, 22 L. J. Ch. 692; *Birch, ex parte*, 28 ib. 894.

(l) *Wrysgan Slate, &c., Co., in re*, 28 L. J. Co. 875; *Murray v. Bush*, L. R. 6 H. L. 37; *ante*, p. 812.

(m) *Fyfe's case*, L. R. 4 Ch. 768; 38 L. J. Ch. 725; *Lowe's case*, L. R. 9 Eq. 589; 39 L. J. Ch. 458.

or provided for by the deed of settlement, the transaction will be invalid, and the retiring members will not be released from liability (*n*). If, on the other hand, the transaction, though not in strict accordance with the mode of transfer prescribed by the deed of settlement, is, nevertheless, such a mode of transfer of shares and of retirement from the company as has been recognised (*o*), and adopted and acted upon by the general body of shareholders, and is not a contrivance to enable certain shareholders, having capital, to get rid of the responsibilities attaching to holders of shares in an insolvent partnership, but is a *bonâ fide* compromise of a controversy between the directors and a particular shareholder with the view of enabling such shareholder to withdraw from the company (*p*), the transaction cannot be treated as a void transaction; and a company is not entitled to treat a transfer as void merely because there has not been an observance of those forms and ceremonies which their own irregularity and neglect have made it impossible strictly to observe (*q*). And, in the case of a *bonâ fide* transfer, when the liability of a new shareholder is intended to be substituted in the place of a retiring member, the transaction will be upheld, if it has been recognised and adopted by the company, although it is not strictly correct in point of form (*r*). If the provisions of the deed of settlement with respect to the admission of new members and shareholders have systematically been disregarded, and some new mode of making a man a shareholder has been adopted by common consent, or with general acquiescence on the part of the shareholders, such new mode of admission will be binding on the company and on the party who has agreed to accept shares and become a member (*s*).

If a contract in writing for the sale or transfer and acceptance of certain specified shares has been entered into, the party who has agreed to accept the shares is liable to be placed on the list of contributories; and such a contract may operate as releasing the one party and rendering the other liable as a contributory, although no transfer deed has been actually executed and registered, and the forms necessary to complete the transfer have never been gone through (*t*). If shares are transferred to a party

(*n*) *Morgan, ex parte*, 18 L. J. Ch. 268; *Ex parte Lawes*, 21 *ib.* 690; *Ex parte Bennett*, 24 *ib.* 130; *Ex parte Stanhope*, 19 *ib.* 389; *Re Newcastle, &c.*, 24 Law T. R. 86; *Spackman's case*, 34 L. J. Ch. 321; *Stanhope's case*, L. R. 1 Ch. 161; *In re Esparto Trading Co.*, 12 Ch. D. 191.

(*o*) *Re Brit. Prov. &c.*, 33 L. J. Ch. 92; *Brotherhood's case*, 31 Bea. 365.

(*p*) *Lord Belhaven's case*, 34 *ib.* 503; 3 De G. J. & S. 41.

(*q*) *Bagge, ex parte*, 20 L. J. Ch. 229; *Jessop's case*, 2 De G. & J. 638.

(*r*) *Murray* v. *Bush*, L. R. 6 H. L. 37.

(*s*) *Walter's case*, 3 De G. & S. 156; *Bargate* v. *Shortridge*, 5 H. L. C. 297.

(*t*) *Sanderson's case*, 3 De G. & S. 66; *Cockburn, ex parte*, 20 L. J. Ch. 138; *Bernard, ex parte*, 21 *ib.* 468; *Yelland, ex parte*, *ib.* 582; *White's case*, 3 De G. & S. 157.

without his knowledge and assent, the transfer is invalid (*u*), and the transferee cannot, of course, be made liable to the debts of the company; but, if the transferee, by his acts, adopts the transfer —if he assumes to be a proprietor, and thinks fit to avail himself of the benefits and advantages of proprietorship—he is to all intents and purposes a member of the company, and cannot avail himself of the objection that the various formalities required by the deed of settlement, to make a man a shareholder, had never been complied with (*x*).

Release from liability to contribute by reason of a forfeiture of shares.—A clause that upon non-payment of calls the shares shall be *ipso facto* forfeited, operates as forfeiture only at the option of the directors (*y*). But, if the directors have declared a forfeiture of the shares, and had power so to do, and the power has been properly exercised, the holder of the forfeited shares, being no longer a shareholder, cannot be made a contributory (*z*). But, if there is a winding up of the company within a year, he will be liable to be put upon the list of past members as a contributory in respect of the forfeited shares (*a*). If the forfeiture is a nullity, as, for instance, if it has been illegally made, or if there is no clause in the deed of settlement or articles of association authorising the forfeiture, the shareholder will not be discharged from liability, and his name must be retained on the list of contributories (*b*). But, if there is a valid resolution declaring a forfeiture, it is immaterial that the name of the owner has not been removed from the register (*c*), or that it had never been placed upon it (*d*), or that notice of the forfeiture has not been given to him (*e*).

Power of company to purchase its own shares.—A company has in general no power to purchase its own shares. It may not do so for the mere purpose of trafficking in them and making a profit thereby (*f*); but it may, under its articles or memorandum, have power to purchase for the purpose of carrying out an arrangement for the benefit of the company (*g*). By the 30 & 31 Vict. c. 131, s. 9, companies have power given to them to reduce their capital (*h*).

Extent and duration of the liability of outgoing and incom-

(*u*) *Hennessy, ex parte*, 2 Mac. & Gord. 207; *Grisewood and Smith's cases*, 4 De G. & J. 544.

(*x*) *Maguire's case*, 3 De G. & S. 35.

(*y*) *Bigg's case*, L. R. 1 Eq. 309.

(*z*) *Woolaston's case*, 4 De G. & J. 445; 28 L. J. Ch. 721.

(*a*) *Creyke's case*, L. R. 5 Ch. 63.

(*b*) *Barton, ex parte*, 28 L. J. Ch. 637; *Jones, ex parte*, 27 *ib.* 668; *Gower's case*, L. R. 6 Eq. 77; *In re London & Prov. Coal Co.*, 5 Ch. D. 525.

(*c*) *Lyster's case*, L. R. 4 Eq. 233; 36 L. J. Ch. 616.

(*d*) *Snell's case*, L. R. 5 Ch. 22.

(*e*) *Knight's case*, L. R. 2 Ch. 321.

(*f*) *Hall's case*, 5 L. R. Ch. 707; *Hope v. International Society*, 4 Ch. D. 327.

(*g*) *In re Dronfield Silkstone Co.*, 17 Ch. D. 76.

(*h*) See *In re Dronfield Silkstone Co.*, *supra*.

ing shareholders.—Generally speaking, when a man comes in as a purchaser of shares in a joint-stock company, he takes them with all their rights and liabilities, so that, if a liability to a loss has been incurred before he purchased, he may be called upon to contribute thereto as soon as he has accepted a transfer of shares and become a shareholder in the concern (*i*). But, if the deed of settlement provides that a selling member shall be absolved from future liabilities, but shall remain liable for losses already incurred, and also provides for the publication of half-yearly balance-sheets, showing the half-yearly profits and losses, which balance-sheets are to be binding and conclusive on all the shareholders, unless some error be discovered in them within a certain limited period, and the partners deal with each other upon the footing of the accounts furnished, the losses to which an outgoing shareholder continues liable, notwithstanding a transfer, will, as between the members *inter se*, be those which appear on the face of such published balance-sheets (*k*). No person can be settled on the list of contributories as a past member until it has been actually ascertained that the present members are unable to satisfy the contributions required to be made by them (*l*). But, when settled on the list, he is liable to contribute in respect of debts and liabilities contracted before he became a member (*m*). The discharge of a contributory who is a member at the time of the winding up will not release him from his liability to indemnify the past member, his transferor, where the company is wound up within twelve months from the transfer (*n*).

Liabilities of husbands, real and personal representatives, heirs-at-law, devisees, and assignees, as contributories.—A husband who has received dividends on shares standing in his wife's name is liable to be made a contributory, unless the shares were purchased by the wife without the participation of the husband, and the company has dealt with the wife exclusively as a married woman having a separate estate, and the question of right and liability is confined to the shareholders *inter se* (*o*). The real and personal representatives of deceased shareholders and parties who have covenanted or agreed to subscribe a certain amount of capital to the joint stock of the company, or to take shares in a completely formed and established company, are liable to be made

(*i*) *Cape's executors, ex parte*, 22 L. J. Ch. 601; *Mayhew, ex parte*, 24 L. J. Ch. 353.

(*k*) *Holme, ex parte*, 22 L. J. Ch. 228.

(*l*) *Needham's case*, L. R. 4 Eq. 135; 36 L. J. Ch. 665; *Andrew's case*, L. R. 3 Ch. 161; see the 25 & 26 Vict. c. 89, s. 38 (3).

(*m*) *Helbert's case*, L. R. 6 Eq. 509.

(*n*) *Roberts* v. *Crowe*, L. R. 7 C. P. 629; 41 L. J. C. P. 198; *Nevill's case*, L. R. 6 Ch. 43; 40 L. J. Ch. 1; *Hudson's case*, L. R. 12 Eq. 1; 40 L. J. Ch. 444.

(*o*) *Burlinson's case*, 3 De G. & S. 19; *Sadler's case*, *ib.* 42; *Angas, ex parte*, 1 *ib.* 560; *Luard, ex parte*, 1 De G. F. & J. 533; 29 L. J. Ch. 269.

contributories to the extent of the assets in their hands, but no further, unless the personal representatives themselves have consented to become, and have been accepted as, shareholders in their own right (*p*). All the real estate of deceased shareholders in the hands of the heir-at-law or of a devisee may be charged with the liabilities of the company incurred long after the death of the shareholder, although the shares may be in the hands of the personal representatives; for, if these last have no personal assets in their hands sufficient to satisfy a call made by the court, both the heir-at-law and the devisee must contribute in respect of the real assets received by them. The devisee, however, on being placed on the list of contributories in respect of the real estate of the testator in his hands, will have a right, as between himself and the other members of the company, to require that all the personal estate of the other members liable to contribute shall be first applied in liquidation of the debts of the company, so that the real estate in the hands of the devisee is not liable until all the available personal estate of the company and the shareholders has been exhausted (*q*).

Where a shareholder, having bequeathed certain shares in a banking co-partnership to her son, and appointed her son and C. her executors, died, and the two executors proved the will, and presented the probate at the office of the company, where it was entered in the books, together with the names of the executors, but the shares continued standing in the name of the deceased shareholder, and the dividends thereon were paid for many years to the son to whom they were bequeathed, and the executorship affairs were wound up except with reference to the shares in question, and the company became insolvent, it was held that the executors were liable as contributories in their character of personal representatives of the deceased shareholder (*r*). There cannot be a discharge of the testator's estate but by the substitution of another person liable (*s*). The trustees of the estate of every bankrupt shareholder are also liable to be made contributories in respect of the estate of the bankrupt in their hands; but they are not subjected to any personal liability by the qualified insertion of their names in the list of contributories, unless they are guilty of some plain breach of duty (*t*). The order of discharge of a bankrupt shareholder, is, of course, a bar to all

(*p*) *Blakeley, ex parte*, L. R. 3 Ch. 154; *Thomas's case*, 1 De G. & S. 579; *Robinson's case*, 20 L. J. Ch. 297.

(*q*) *Hamer's dev., ex parte*, 21 L. J. Ch. 832; 2 De G. M. & G. 366; *Turquand* v. *Kirby*, 36 L. J. Ch. 570; L. R. 4 Eq. 123.

(*r*) *Ex parte Crosfield*, 16 Jur. 731.

(*s*) *Ex parte Wood*, 22 L. J. Ch. 365; 17 Jur. 813; *Keene's Executors*, 3 De G. M. & G. 280.

(*t*) *Kuper's assignees*, 3 De G. & S. 113.

calls made on him for contribution before the date of his bankruptcy (u).

Railway companies—Contracts ultra vires.—Railway companies, like registered joint-stock companies, are not entitled to engage in business not authorised by their Act of parliament. Although, therefore, the Act of parliament which constitutes and incorporates the company contains no prohibition against the company's engaging in any business except that of making and maintaining and using the railway, yet, if all the shareholders excepting one agree to carry on a different business, that single dissentient shareholder may go to the court for an injunction (x). But acquiescence on the part of those who complain of the violation of the principle will induce the court to refuse relief; they must come with diligence to assert their rights (y).

Powers of the directors.—As a general rule, the directors have no right to pledge the funds of the company for the purpose of supporting the operations of another company, or for carrying on a new trade, or for any transactions different from those they are expressly authorised to carry out. If the company has possessed itself of shares in another independent railway company, it cannot legally, if there be a single dissentient shareholder, increase the number of its shares, or apply its funds for the support of the second company (z). If it has been authorised to make a railway to the banks of a navigable river, and erect thereon wharves and warehouses for the reception and storage of merchandise, and empowered to raise funds for these purposes, it cannot lawfully apply such funds when raised in deepening the river and improving the navigation thereof (a). If, under separate Acts of parliament, the company has power to construct branch railways in connection with its main line, and to raise capital for the purpose, it cannot lawfully apply the money raised for the construction of the branch railways to the prosecution of works on the main line (b). But a railway company authorised to construct a railway on the broad gauge may lay down rails on the narrow gauge (c); and, when authorised to contract with other companies for the use of the railway, or for the passage thereon of the carriages and engines of other companies on payment of toll, may make any *bonâ fide* bargains for carrying into effect the

(u) *Chapple's case*, 5 De G. & S. 400; *Parbury, ex parte*, 30 L. J. Ch. 513.

(x) *Att.-Gen.* v. *Gt. North. Ry. Co.*, 29 L. J. Ch. 48; *Hare* v. *Lond. & North-West. Ry. Co.* 30 L. J. Ch. 817; *Forrest* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, 30 Beav. 40; *Att.-Gen.* v. *Gt. East. Ry.*, 5 Ap. Cas. 473.

(y) *Graham* v. *Birk., &c. Ry. Co.*, 12 Beav. 466; 2 Mac. & G. 146; *Ffooks* v. *Lond. & S. W.*, 17 Jur. 365.

(z) *Salomons* v. *Laing*, 12 Beav. 339.

(a) *Munt* v. *Shrews. & Chest. Ry. Co.*, 13 Beav. 1.

(b) *Bagshaw* v. *East Un.*, 2 Mac. & Gor. 389.

(c) *Beman* v. *Rufford*, 1 Sim. N. S. 550; 15 Jur. 914.

objects authorised, however imprudent and unwise the contract may be (*d*).

Applications to parliament for an extension of the powers of the company.—It is competent for the corporation at any time to apply to parliament to vary or extend the objects for which the company was originally incorporated, and to enter into contracts for works and services, and employ their funds in furtherance of such an object (*e*); and it is not within the province of a court to decide on the propriety of the application, or to interfere to prevent it. But the court will, in certain cases, interfere to prevent a company from using its funds, and pledging its credit, and entering into contracts, for the purpose of such an application (*f*). If the Act is obtained, provisions are generally inserted therein prescribing the mode in which the costs and expenses incurred in the procurement of the Act are to be defrayed. These are either made a charge upon the general funds and property of the company, or upon the capital to be raised under the new Act (*g*).

Void contracts by chairmen of railway companies.—Where the chairman of the South Eastern Railway Company promised the managing committee of a proposed Deal and Dover Railway Company that, if the committee went on with their project and applied to parliament for an Act of incorporation, the South Eastern Railway Company would, in case of the rejection of the scheme, insure the committee against loss, &c., and an action was brought against the chairman for a breach of his undertaking, it was held that the contract was void, as it was a promise that the South Eastern Railway Company should do an act which was contrary to the public law of the country, of which law all the parties to the contract were bound to take notice (*h*). The managing body of a railway company has no power to enter into a contract fixing and regulating the future traffic which may be carried on upon a line of railway which the company may thereafter be empowered to construct, so as to give to another railway company an interest in such traffic and profits (*i*).

Money borrowed by directors on debentures.—When directors borrow money on debenture, in pursuance of the statutory power

(*d*) *South York. Ry. Co.* v. *Gt. North.*, 9 Exch. 55; 22 L. J. Ex. 305.

(*e*) *Bateman* v. *Mayor, &c., of Ashton-under-Lyne*, 3 H. & N. 323; 27 L. J. Ex. 458; see *Llanelly Ry. Co.* v. *L. & N. W. Ry. Co.*, L. R. 7 H. L. 550.

(*f*) *Great West. Ry. Co.* v. *Rushout*, 5 De Gex & Sm. 290; *Winch* v. *Birk., &c.*, 16 Jur. 1035; *Ware* v. *Grand Junc.*, 2 Russ. & M. 470.

(*g*) *Att.-Gen.* v. *Eastlake*, 22 Law T. R. Ch. 20; *Att.-Gen.* v. *Guard. Southampt.*, 17 Sim. 6; *Att.-Gen.* v. *Andrews*, 2 M'N. & G. 225; *Stevens* v. *South Dev. Ry. Co.*, 13 Beav. 59.

(*h*) *Macgregor* v. *Deal, Dover, &c.*, 18 Q. B. 618; 22 L. J. Q. B. 69.

(*i*) *Midland Ry. Co.* v. *London & North Western Ry. Co.*, L. R. 2 Eq. 524; 35 L. J. Ch. 31.

conferred upon them, charging the tolls or rates they are authorised to levy with the re-payment of the money advanced, and not entering into any personal covenant in their own names on behalf of the company, they incur no personal liability (*k*); but, if they exceed their borrowing powers, or do not pursue the authority given to them, they may render themselves personally responsible for falsely representing that they had power to borrow the money on the credit of the undertaking, and had charged the tolls, or rates, or funds of the company with the re-payment of the money (*l*). Where a railway company, by debenture, assigned to the plaintiff "the undertaking, and all tolls and sums of money" arising by virtue of their Act of incorporation, to hold until principal and interest were satisfied, the principal sum to be re-paid by a time specified, it was held that the last-named stipulation amounted to a covenant on the part of the company for the payment of the money (*m*). A mortgage or bond for securing money borrowed by a railway company, according to the form in schedule C., annexed to the Companies Clauses Consolidation Act, 1845, charges the "going concern" created by the Act, and the earnings of the undertaking, but not the surplus lands of the company or the proceeds of the sale of them (*n*). But a company may give a specific charge on the moneys to arise from the sale of its surplus lands for a debt due to the contractors who have constructed the works (*o*); or a company may issue bonds or obligations binding all their "estate, property, and effects," if they are empowered to do so by their articles of association (*p*), but this will be subject to the power of the directors to dispose of such property for the purposes of carrying on their business (*q*).

Bonds and loan notes by directors.—Directors of railway companies cannot borrow money, except in the way authorised by the special Act. When they are empowered to borrow on mortgage, this is a special, limited mode of borrowing, and they cannot borrow on bond or loan note, so as to charge the company with the re-payment of the money; but, where there is a debt due to contractors in respect of work done for the company, a

(*k*) *Pontet* v. *Basingstoke Can. Co.*, 4 Sc. 189; *Pardoe* v. *Price*, 11 M. & W. 427.

(*l*) *Collen* v. *Wright*, 8 Ell. & Bl. 647; 26 L. J. Q. B. 147; 27 *ib.* 217; *Polhill* v. *Walter*, 3 B. & Ad. 124; *Chapleo* v. *Brunswick Building Soc.*, 6 Q. B. D. 696.

(*m*) *Hart* v. *East Un. Ry. Co.*, 7 Exch. 246; *East* [illegible], *&c.* v. *Hart*, 8 Exch. 116; *Jackson* v. *N. E. Ry. Co.*, 7 Ch. D. 573.

(*n*) *Legg* v. *Mathieson*, 29 L. J. Ch. 384; *Furness* v. *Caterham Ry.*, 27 Beav. 358; *Gardner* v. *London, Chatham, & Dover Ry. Co.*, L R. 2 Ch. 201; 36 L. J. Ch. 323; see *Attree* v. *Hawe*, 9 Ch. D. 337; *In re Herne Bay Co.*, 10 Ch. D. 42; 5 B. & S. 588.

(*o*) *Gardner* v. *London, Chatham & Dover Ry. Co.*, L. R. 2 Ch. 201; 36 L. J. Ch. 323.

(*p*) *In re Florence Land Co.*, 10 Ch. D. 530.

(*q*) *Id.*; see also *In re Hamilton's Windsor Ironworks*, 12 Ch. D. 707; *Hodson* v. *Tea Co.*, 14 Ch. D. 859; as to uncalled capital, see *In re Colonial Trusts*, 15 Ch. D. 465.

bond acknowledging the debt and binding the company to pay it may be issued (r). A railway company, having no power to borrow, sold their rolling-stock to a wagon company, and agreed to pay the wagon company a rent for the use of it, which would re-pay the wagon company the whole of the purchase-money with interest in a few years. It was held that this was in fact a borrowing, and void (s).

Contracts in which a director is personally interested.—No person interested in any contract with a railway company is capable of being a director; and no director is capable of being interested in any such contract; if he is either directly or indirectly concerned in any such contract, the office of such director is vacant, and he must thenceforth cease from voting and acting as a director. The contract itself is not expressly avoided (t); but it is bad on general principles of equity, and, of course, cannot be specifically enforced (u). Every director is precluded from dealing on behalf of the company with himself or a firm of which he is a partner. Having duties of a fiduciary character to discharge, he cannot enter into engagements in which his own personal interest may possibly conflict with the interests of those whom he is bound to protect (x). It is an implied and inherent term of the contract or relationship subsisting between directors and shareholders, that the directors shall not make any profit to themselves out of the transactions they enter into on behalf of the company, and shall not acquire any interest adverse to their duty (y).

Indemnification of directors.—No director is liable to be sued by reason of his being a party to any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors. The directors, their heirs, executors, &c., are to be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them; and the directors for the time being may apply the existing funds and capital of the company for the purposes of such indemnity, and may, if necessary, for that purpose, make

(r) *Chambers* v. *Manch. & Milfd. Ry. Co.*, 33 L. J. Q. B. 268; *In re Cork & Youghal Ry. Co.*, L. R. 4 Ch. 748; *Landowners' Co.* v. *Ashford*, 16 Ch. D. 411; 7 & 8 Vict. c. 85, s. 19.

(s) *Yorkshire Ry. Waggon Co.* v. *Maclure*, 19 Ch. D. 478; see *post*, Void Contracts, p. 1147.

(t) 8 & 9 Vict. c. 16, ss. 85, 86; *Foster* v. *Oxfd., &c., Ry. Co.*, 13 C. B. 200.

(u) *Flanagan* v. *Gt. Western Ry. Co.*, L. R. 7 Eq. 116; 38 L. J. Ch. 117.

(x) *Aberdeen Ry. Co.* v. *Blaikie*, 1 Macq. 461.

(y) *Benson* v. *Heathorn*, 1 Y. & C. Ch. C. 341; *York. & North Mid.* v. *Hudson*, 16 Bea. 485; 22 L. J. Ch. 529; *Gaskell* v. *Chambers*, 26 Beav. 360; *Parker* v. *McKenna*, L. R. 10 Ch. 196.

calls of the capital remaining unpaid (z). The directors are protected from liability so long only as they act within the scope of their power and authority as directors, and bind the company by their contracts. If they do not strictly pursue the powers given them, and fail to bind the company, they are in general individually responsible for the fulfilment of the engagements they have entered into (*ante*, p. 825). They are responsible also for gross negligence and misconduct in the administration of the corporate funds, and the management of the business intrusted to them, and cannot shelter themselves from the ordinary consequences resulting from breaches of trust and neglect of duty under the protecting clause of the Act of parliament. They cannot be said to be lawfully executing the Act when they are misbehaving themselves (a).

Contracts between projectors and members of committees of management of projected undertakings.—We have already seen (*ante*, p. 797) that, whenever a number of persons are jointly associated together and contribute labour or services, or money or goods, or house-room or apartments, in furtherance of a common design, the law raises no implied contract or promise between them, or from any one or more of them in favour of another, for payment or remuneration for the services so rendered, or goods supplied, or for re-payment of the money advanced. The services, therefore, rendered, and the things done, by any one member of a managing committee of a particular undertaking, in the discharge of the functions of such committee, cannot be made the subject of a claim for payment or remuneration on his part as against the committee at large. The things done by him individually have been done for his own benefit and advantage, as well as for the benefit of the rest of the promoters and managers. All are presumed to contribute in some shape or another to the advancement of the joint undertaking; and the supposed superior services of one cannot be made the foundation of a claim for remuneration from another. Thus, where a surveyor took an active part in the promotion of a railway company, gave notices of an intended application to parliament, and subscribed for some of the shares, it was held that he could not maintain an action against the co-projectors for work done by him and money paid in furtherance of the joint undertaking (b). So, where the inventor and patentee of a new scheme for making roads got a number of gentlemen to act as a provisional committee for the formation of a joint-stock company, to carry his scheme into effect and work

(z) 8 & 9 Vict. c. 16, s. 100.
(a) See *post*, 832, negligence of directors.
(b) *Holmes* v. *Higgins*, 1 B. & C. 74.

the patent, and acted as secretary to the committee, it was held that he could not maintain an action against such committee, or any of the members thereof, for his services as such secretary, or for his trouble, or for journeys undertaken by him in furtherance and execution of the scheme, as he was himself one of the movers and instigators of the project, and the members of the committee had just as much right to charge him for their attendance and attention to his scheme, as he them for his services as secretary (c).

Contracts for the payment of the projector out of the deposits.—Where a solicitor started a joint-stock company, and got several persons to form themselves into a committee of management, under an agreement that he would not hold any of them personally liable to him for the expenses incurred in the promotion of the project, but would pay all the expenses of promoting the company up to the time of the payment of the deposits, and would look to the deposits alone as the means of re-payment, "the said deposits being held liable for that purpose by the directors of the company," and deposits to a large amount were received, and a parliamentary contract and a subscribers' agreement signed by the parties paying such deposits, authorising the directors to apply them in liquidation and discharge of the expenses incurred in the furtherance of the undertaking, it was held that the projector might proceed by bill in chancery against the directors and the provisional committee for the application of the money raised by the deposits in payment of his costs and disbursements on behalf of the company, and for an injunction against their parting with the fund (d).

Contribution between joint managers, directors, and provisional committeemen.—Where an action was brought against four persons who had acted as managers and directors of a projected railway company, for the recovery of a debt contracted by them in the carrying out of the project, and they jointly retained an attorney to defend the action upon their own responsibility, and one of the managers was subsequently compelled by the attorney to pay more than his proportion of the joint expense of defending the action, it was held that he was entitled to an action against his colleagues to recover from them their several proportions of the over payment by way of contribution to the common liability (e). If all the members of a provisional committee have not joined in authorising the same contract, the contribution is confined to those who incurred the joint liability which has been

(c) *Parkin* v. *Fry*, 2 C. & P. 311.
(d) *Parsons* v. *Spooner*, 15 L. J. Ch. 155.
(e) *Edger* v. *Knapp*, 6 Sc. N. R. 707.

discharged, and in respect of which the action is brought; and to determine the share that each is to pay, regard must be had to the number of the original co-contractors, so that, if twelve originally authorised the contract, and two are dead at the time the right of action for contribution arises, the survivors can only be called upon for one twelfth-part each, the personal representatives of the deceased co-contractors being responsible for the residue of the contributory demand (*f*).

Of the rendering of accounts and of the appropriation of the funds.—The managing committee of a projected undertaking are trustees for the shareholders, and liable to account to them for all monies which have been received for the purposes of the undertaking (*g*). One member of the committee is entitled, as against the rest, to an account of the joint property, and of the joint debts and liabilities, and to have the joint property applied in discharge of such debts (*h*).

Contracts between a committee of management on the one hand and subscribers and shareholders on the other.—The execution by a subscriber of a deed providing that a railway company is to be formed upon certain terms and conditions, and that a certain amount of capital is to be raised, a certain number of shares issued, an Act of parliament obtained, and other preliminary proceedings undertaken prior to the incorporation of the company, does not, as we have already seen (*ante*, p. 795), make the subscriber so executing the deed a partner with the projectors and managers in carrying out the undertaking. Neither does an agreement to take shares, or the acceptance of an allotment of shares, and payment of a deposit thereon, make the party who has entered into the agreement, or paid the deposit, a partner with the projectors and managers, until the prescribed capital has been raised, the shares taken, and the conditions precedent to the formation and incorporation of the company have been accomplished. They stand merely in the position of persons who have offered to become partners in a projected co-partnership, provided it is constituted and brought into operation *bonâ fide* in the mode advertised and announced, and not in the position of partners in a present partnership (*i*). The promoters, and projectors, and members of the committee of management, are consequently responsible to the subscribers and shareholders for money advanced, or goods supplied, or work done, or services rendered in furtherance of the project by any one or more of such

(*f*) *Batard* v. *Hawes*, 2 Ell. & Bl. 298.

(*g*) *Williams* v. *Page*, 24 Beav. 654.

(*h*) *Lewis* v. *Billing*, 15 L. J. Ch. 425.

(*i*) *Bourne* v. *Freeth*, 9 B. & C. 640; 4 M. & R. 518; *Wood* v. *Duke of Argyll*, 7 Sc. N. R. 885; 6 M. & Gr. 928.

subscribers by the orders, or at the request, of the members of such committee of management (*k*).

Allotment of shares.—The promoters and managers of a railway company are responsible also to a subscriber or applicant for shares, who has received from them letters of allotment of shares or of an interest in the undertaking, and has paid his subscription or deposit, for the non-delivery of scrip certificates of shares pursuant to the letters of allotment and the contract in that behalf made. And it has been held that an allotment of scrip and shares in an abortive scheme, which does not correspond with the prospectus and the public advertisements of the projectors, is not a compliance with the ordinary undertaking to deliver shares (*l*). A resolution by shareholders, that a certain number of shares shall be at the disposal of the managers, places them at their disposal only as trustees, to be disposed of within the scope of the functions delegated to them in the manner most beneficial to their beneficiaries (*m*). The managers, in the due fulfilment of their trust, are bound to account to each shareholder or subscriber for the monies received by them, and to apply the funds in their hands in liquidation of the debts and engagements of the company (*n*).

Payment of subscriptions and deposits.—The managers of a projected railway company may sue the subscribers for the sums they have agreed to subscribe, or for the deposits which they have agreed to pay, on receiving an allotment of shares, provided the covenant or contract to pay the subscription or deposit has not been obtained through the medium of any wilful and fraudulent misrepresentation or mis-statement (*o*). Where an allottee had applied for shares generally in a projected railway company, and undertook to accept them and pay the deposit, and the directors assigned him shares headed "not transferable," and then sued him for the deposit, it was held that he was not responsible, as his offer must be taken to have been an offer to accept and pay for transferable shares (*p*).

Recovery of deposits on the abandonment of the undertaking.—If the scheme has been abandoned, or has not been carried out according to the terms of the prospectus or public announcement of the projectors and managers, the subscribers who have advanced money or paid deposits on the shares allotted to them are entitled

(*k*) *Colley* v. *Smith*, 2 M. & Rob. 96; *Caldicott* v. *Griffiths*, 8 Exch. 902.

(*l*) *Walstab* v. *Spottiswoode*, 4 Rail. C. 321; 15 L. J. Q. B. 198.

(*m*) *Pulsford* v. *Richards*, 22 L. J. Ch. 564; *York & North Midland* v. *Hudson*, 16 Bea. 485; 22 L. J. Ch. 529.

(*n*) *Cooper* v. *Webb*, 15 Sim. 454; *Cridland* v. *Lord de Mauley*, 17 L. J. Ch. 190; *Maitland*, *ex parte*, 23 L. J. Ch. 140.

(*o*) *Duke* v. *Forbes*, 1 Exch. 356; *Aldham* v. *Brown*, 29 L. J. Q. B. 38; 7 Ell. & Bl. 164.

(*p*) *Duke* v. *Andrews*, 17 L. J. Ex. 231.

to recover back the amount paid, free from deductions and drawbacks in respect of the expenses that have been incurred by the managers in their attempt to bring the project to bear (*q*), unless the failure or abandonment of the undertaking has been occasioned by the act or default of the plaintiff himself, or it has been expressly agreed that the money raised by subscription and deposits should be applied in liquidation and discharge of those expenses (*r*). If the managers have by parol agreed to return the deposits in case an act of incorporation is not obtained, and a parliamentary contract and subscribers' agreement under seal is afterwards executed, authorising the directors to expend the deposits in defraying the necessary expenses, the first agreement is not extinguished by the subsequent contract, if the two contracts have not been entered into by the same parties (*s*). When deposits have been put into the hands of a committee with authority to deal with them in a certain way, it is not competent to any one, or more, not being the whole, of the persons who have joined in giving the authority to revoke it (*t*).

Misrepresentation by committeemen and managers.—Any material mis-statement or misrepresentation concerning the actual condition of the projected undertaking, the amount of capital subscribed, and the number of subscribers, or co-adjutors, or co-adventurers in the project, is a fraud upon those who have subscribed their money and connected themselves with the company in reliance upon the published statements, and entitles them to avoid the contract they have entered into with the projectors and managers, and recover back from them the amount of their deposits and subscriptions, unless they were cognizant of the fraud at the time they took their shares, and voluntarily made themselves parties to a bubble speculation (*u*). It is therefore necessary, in preparing prospectuses of joint stock undertakings, to state nothing on the face of the prospectus but what is strictly true (*x*). In an action for the recovery of the deposit paid on an allotment of shares, on the ground that the money was obtained by fraudulent misrepresentation or by false pretences, it must be shown that the money was actually received by the parties against

(*q*) *Nockells* v. *Crosby*, 5 D. & R. 760; 3 B. & C. 823; *Chaplin* v. *Clarke*, 4 Exch. 403; *Walstab* v. *Spottiswoode*, 15 M. & W. 501; *Johnson* v. *Goslett*, 3 C. B. N. S. 594; 27 L. J. C. P. 122.

(*r*) *Jones* v. *Harrison*, 17 L. J. Ex. 132; *Garwood* v. *Ede*, *ib.* 29; *Clements* v. *Todd*, *ib.* [illegible]; *Watts* v. *Salter*, 10 C. B. 477; 20 L. J. C. P. 43; *Baird* v. *Ross*, 25 Law T. R. 34; *Ashpitel* v. *Sercomb*, 5 Exch. 146.

(*s*) *Moratt* v. *Ld. Londesborough*, 4 Ell. & Bl. 9.

(*t*) *Baird* v. *Ross*, 2 Macq. 61.

(*u*) *Wontner* v. *Shairp*, 4 C. B. 404; 4 Rail. C. 542; *Cridland* v. *Lord de Mauley*, 17 L. J. Ch. 190; *Nicol's case*, 3 De G. & J. 440; *Hill* v. *Lane*, L. R. 11 Eq. 215; 40 L. J. Ch. 41; *Ship* v. *Crosshill*, L. R. 10 Eq. 73; 39 L. J. Ch. 550.

(*x*) *New Bruns. & Canada Ry. Co.* v. *Muggeridge*, 30 L. J. Ch. 242; 3 Law T. R. N. S. 651.

whom the action is brought, or that it was at their disposal, and that they were parties to the fraud. They are not liable for a fraudulent misrepresentation made by the secretary or solicitor of the company without their knowledge or sanction (*y*).

Dissolution of inchoate railway and parliamentary works' companies—Contributories.—Persons who act together for the purpose of obtaining an Act of parliament for the purpose of incorporating a railway company, and making a railway, are a company or association within the meaning of the 25 & 26 Vict. c. 89, and may be dissolved and wound up by the Court. "All the questions as to the liability of contributories to inchoate railway and parliamentary works' companies, under the winding-up Acts, resolve themselves into two simple questions of fact: first, did the alleged contributory make, or authorise to be made, the contract in respect of which he is called upon to contribute on his account jointly with others? or, secondly, if any one or more entered into the contract on his own or their own behalf, did he agree to indemnify the person or persons contracting in part or in all against the consequences of that contract?" Those who are liable to pay the debts incurred in the attempt to form the company, who have given the orders, or have concurred in giving them, are the parties to be made contributories; and no one can lawfully be put on the list of contributories merely by reason of his having agreed to take, or having accepted and become an allottee of, shares, and paid a deposit (*z*). A provisional committeeman, who has accepted shares, and paid a deposit, but has done no further act, is not thereby rendered liable to creditors in respect of business done by order of the managers towards completing the projected undertaking, and cannot lawfully be made a contributory to the debts due to such creditors (*a*). But, if a provisional committee undertakes the management of the projected company, and gives orders, if, for instance, it appoints a managing committee, and such managing committee acts under the authority of the provisional committee, as their servants and agents, all members of the provisional committee who have concurred in the proceedings, and authorised debts to be incurred by the managing committee, will be liable to be made contributories to the payment of those debts (*b*).

The question in every case is not merely what meetings has a

(*y*) *Watson* v. *Earl Charlemont*, 12 Q. B. 856; 18 L. J. Q. B. 65; *Burnside* v. *Dayrell*, 3 Exch. 224.

(*z*) *Capper, ex parte*, 20 L. J. Ch. 151; *Carrick, ex parte, ib.* 671; *Maudslay, ex parte, ib.* 9; *Barber, ex parte, ib.* 146; *Beardshaw, ex parte*, 22 *ib.* 18.

(*a*) *Cottle, ex parte*, 2 Mac. & Gord. 190; *Bright* v. *Hutton*, 3 H. L. C. 341; 16 Jur. 695; *Carmichael, ex parte*, 20 L. J. Ch. 12; *Clarke, ex parte, ib.* 14; *Heref. & Merth. Tid. Ry. Co.*, 4 Law T. R. N. S. 134.

(*b*) *Tanner, ex parte*, 21 L. J. Ch. 214; *Spottiswoode's case*, 6 De G. M. & G. 371

committeeman attended, but what acts he authorised to be done. Attendance at a meeting proves in general that the party so attending is a member of the body assembled; but it proves no more. If any act is done by the meeting, the circumstances may be such as to warrant the presumption that what was done was the act of every person present. Such may be the fair inference under some circumstances; it may be a very unreasonable inference in others; and no one present at such a meeting is bound by any resolution to which he does not expressly or impliedly assent (*c*). But all persons who have taken part in the management of the company, who have attended meetings of the managers, and concurred in giving orders for things to be done and for expenses to be incurred, are liable to be made contributories to the debts incurred in carrying such orders into effect (*d*); and so are all persons who have authorised the managing committee to act for them, and are under an obligation to indemnify such managing committee in respect of expenses *bonâ fide* incurred by them (*ante*, p. 810). All persons, also, who are associated together in the furtherance of a common object, who concur in giving orders, or impliedly authorise one another to take all the necessary steps to carry the common purpose into effect, are bound by a well-established principle of equity to bear the burthen equally, so that, if one alone incurs a necessary expense in the furtherance of the joint undertaking, the others must contribute their fair share of it (*e*). All persons, also, who have signed a subscribers' agreement or parliamentary contract, and have covenanted or agreed to pay a certain portion of the preliminary expenses of the project and of the application to parliament for an Act of incorporation, may be properly placed on the list of contributories, although they have never received either scrip or shares (*f*).

Negligence of directors of public companies.—If directors of a joint-stock company receive the deposits of shareholders for a company with certain objects, and subsequently, by the memorandum of association, register other and different objects, the shareholder may defend an action for calls, and obtain the cancellation of the contract in equity, and, it would seem, may, at least in cases of actual fraud, sue the directors in a court of equity for neglect of duty, and so obtain the return of the money deposited (*g*).

(*c*) *Roberts, ex parte*, 2 Mac. & Gord. 194.

(*d*) *Pearson's executors*, 3 De G. M. & G. 252; *Norbury's case*, 5 De G. & S. 423; *Londesborough, ex parte*, 23 L. J. Ch. 743.

(*e*) *Amsinck, ex parte*, 25 Law T. R. Ch. 136.

(*f*) *Bowen, ex parte*, 22 L. J. Ch. 857; *Warwick & Worc. Ry. Co., in re*, 27 L. J. Ch. 735.

(*g*) *Stewart* v. *Austin*, L. R. 3 Eq. 299; *Ship* v. *Crosskill*, L. R. 10 Eq. 73.

And the official liquidator, on behalf of all the shareholders, or the individual shareholders, according to circumstances, may institute a suit in equity against the directors for the purpose of compelling them to make good losses occasioned by their misconduct in the management of the Company's affairs, *e.g.*, by their acting contrary to provisions in the deed of settlement, issuing false balance-sheets, paying dividends out of capital (*h*), paying bonuses without a proper balance-sheet, or making due allowance for risks which the company had incurred, &c. (*i*). But the directors of a company, who purchased the business of an insolvent partnership composed of men possessed of real estate, are not necessarily liable for negligence, in not taking mortgages on the estates of such partners (*k*). Nor for mere imprudence, not amounting to *crassa negligentia*, fraud or malfeasance (*l*). Nor would they as a body be liable for the acts of a few of their number, acting as an executive committee,' who, with a view to enhance the price of the shares, bought them with the company's money, but concealed the transaction under colour of a loan to third persons apparently solvent and respectable (*m*). Nor for publishing a debtor and creditor account of the company, in which they credited the company with debts as good, believing them to be such, which subsequently turned out to be bad, and issuing fresh shares at a premium on that assumption (*n*).

If facts are proved showing it to be the duty of a joint-stock company to register the plaintiff as a shareholder, and grant him a certificate of proprietorship of shares in the company, the company will be responsible in damages for neglecting their duty in that behalf, though no actual pecuniary damage is proved to have been sustained by the plaintiff (*o*).

(*h*) *Turquand* v. *Marshall*, L. R. 6 Eq. Ca. 112; 4 Ch. App. 376; 38 L. J. Ch. 639; see *General Exchange Bank* v. *Horner*, L. R. 9 Eq. Ca. 480.

(*i*) *Rance's case*, L. R. 6 Ch. App. 104

(*k*) *Overend & Co.* v. *Gurney*, L. R. 4 Ch. App. 701.

(*l*) *Overend & Co.* v. *Gibb*, L. R. 5 Eng. & Ir. Ap. 480.

(*m*) *Land Credit Co. of Ireland* v. *Lord Fermoy*, L. R. 5 Ch. 763.

(*n*) *Jackson* v. *Turquand*, L. R. 4 Eng. & Ir. Ap. 305

(*o*) *Catchpole* v. *Ambergate, &c., Ry. Co.*, 1 El. & Bl. 120; 22 L. J. Q. B. 35.

SECTION III.

OF MARRIAGE.

[*** *In this section, so far as it relates to the rights or liabilities of husband or wife, the Act of* 1882 *in the Appendix to this volume must be consulted.*]

Contracts in restraint of marriage are void, as being contrary to the public policy of the law (*a*). A covenant or promise, therefore, which restrains a party from marrying AT ALL, unless he marries a particular person, is null and void (*b*). If the restraint is not to operate for an indefinite period, but only for six years, there must be reasonable grounds to restrain the party for that period (*c*). But the law recognises in a husband a species of interest in the widowhood of his wife, which makes it lawful for him to grant an annuity to his widow, to continue so long only as she remains unmarried (*d*).

Marriage brokerage contracts, or contracts for the payment of money, or the conveyance of property, or the performance of some act or duty, on the condition of the procurement of a particular marriage, are void, as being contrary to public policy. If, therefore, a man binds himself to pay a sum of money to another, on condition that he will bring about a particular marriage, the instrument is void (*e*), whether the condition, or cause, or consideration for the bond or covenant does or does not appear upon the face of it (*f*). A bond, given by the husband to the wife's father to induce the latter to give his consent to the marriage, has been held to be in the nature of a marriage brokerage contract, and contrary to public policy (*g*). And there is no difference between a bond to pay money, and a bond to forgive a debt due, or a covenant or agreement to release an obligation, duty, or liability, as an inducement for the consent of parents and guardians. Therefore, where a mother said, "You shall not have my daughter, unless you will agree to release all accounts respecting my expenditure of her money," and the agreement was given, it was held to be within the mischief of a marriage brokerage contract (*h*).

(*a*) *Baker* v. *White*, 2 Vern. 215; *Hartley* v. *Rice*, 10 East, 24; *Bonfield* v. *Hassall*, 32 L. J. Ch. 475.

(*b*) *Lowe* v. *Peers*, 4 Burr. 2230–2234.

(*c*) *Hartley* v. *Rice*, 10 East, 23, 24. But a covenant to pay a woman a sum of money, so long as she continues sole and unmarried, is not illegal; *Gibson* v. *Dickie*, 3 M. & S. 463.

(*d*) *Lloyd* v. *Lloyd*, 21 L. J. Ch. 596; *Newton* v. *Marsden*, 2 Johns. & H. 356; 31 L. J. Ch. 690.

(*e*) *Hall* v. *Potter*, 3 Lev. 411; Show. P. C. 76; 4 Br. P. C. 145, n.; 3 P. Wms. 76.

(*f*) *Collins* v. *Blantern*, 2 Wils. 347; *Arundel* v. *Trevillian*, 1 Ch. Rep. 47; *Drury* v. *Hooke*, 1 Vern. 411; *Debenham* v. *Ox*, 1 Ves. senr. 276; *Smith* v. *Aykwell*, 3 Atk. 566; *Cole* v. *Gibson*, 1 Ves. senr. 503; *Booth* v. *Earl of Warrington*, 4 Br. P. C. 163.

(*g*) *Keat* v. *Allen*, 2 Vern. 558; Pre. Ch. 267.

(*h*) *Hamilton* v. *Mohum*, 1 P. Wms. 120; 2 Vern. 652; 1 Salk. 158.

A lease granted in consideration of the procurement of a particular marriage will be set aside, and the estate discharged of the lease (*i*).

Bonds and unilateral covenants to marry.—If a man of full age binds himself by deed to marry a woman by a day named, he is responsible for the non-performance of his bond or covenant, although the woman may not be bound by a reciprocal contract to marry him (*k*). If the covenantee is ready and willing to receive the covenantor as a husband, and the latter neglects to fulfil his contract, he is liable to an action, for it is the duty of the man to go and offer himself to the woman, and not for the woman to go in search of the man (*l*). A woman is also as much bound by such a deed or covenant as a man, provided it has been obtained openly and fairly, and with perfect good faith. But, as women are in general peculiarly liable to be deceived aud imposed upon in affairs in which their feelings are concerned, such a contract or engagement obtained from a woman is regarded with the greatest jealousy and suspicion, particularly where the man has entered into no corresponding engagement on his part (*m*). If such a bond is obtained by means of any misrepresentation or concealment of the circumstances and situation in life of the party to whom it is given, it is undoubtedly fraudulent, and may be set aside (*n*). Where a bond was given by the defendant, a single lady, which recited that a marriage had been agreed upon between her and the plaintiff, but had been deferred at her request until after the death of her father, and as a provision for the plaintiff she bound herself to give him 1,200*l*., and interest at 5*l*. per cent., in case she should refuse to marry him on her father's death, or should intermarry with anybody else, and the lady broke her engagement by marrying a third party, it was held that she and her husband were responsible for the payment of the money (*o*). But, if a bond of this description has been clandestinely obtained from a single lady having expectations from her parent, without the knowledge of such parent, it is a fraud upon the latter; and the court, if appealed to, will set it aside (*p*).

Contracts of betrothment are contracts between a man and a woman to marry at a future time. If a man makes an offer of marriage to a woman, the acceptance thereof by the latter may, so far as it is necessary to be proved in order to enable her to sustain an action against the man for a breach of his engagement, be

(*i*) *Stribblehill* v. *Brett*, 2 Vern. 446; 4 Br. P. C. 145.
(*k*) *Atkins* v. *Farr*, 1 Atk. 287.
(*l*) *Holcroft* v. *Dickenson*, 1 Freem. 346; *Seymour* v. *Gartside*, 2 D. & R. 57.
(*m*) *Cock* v. *Richards*, 10 Ves. 437.
(*n*) *Key* v. *Bradshaw*, 2 Vern. 102.
(*o*) *Box* v. *Day*, 1 Wils. 59.
(*p*) *Woodhouse* v. *Shepley*, 2 Atk. 539; *Drury* v. *Hooke*, 1 Vern. 411; *Hartley* v. *Rice*, 10 East, 22.

established through the medium of her conduct and actions at the time, as well as by express words (*q*). If there be an express promise by the man, and it appears that the woman countenanced it, and by her actions at that time behaved herself as if she agreed to the matter, that is sufficient evidence of a promise on her side (*r*). Therefore, where a gentleman asked for and obtained the consent of the parents to his marriage with their daughter, and the young lady stood in the room within the hearing of the parties, and made no objection to the match, it was held that her silence afforded as cogent evidence of her assent as an express affirmative (*s*).

Authentication of the contract.—Oral engagements and promises to marry will sustain an action, unless the marriage is limited to take place upwards of a year from the making of the contract (*ante*, p. 170). A man who was paying attentions to a girl was asked what his intentions were, and he replied, "I have pledged my honour to marry the girl in a month after Christmas;" and it was held that this declaration, taken in connection with his visits to the house and conduct towards the girl, was sufficient evidence of a promise of marriage (*t*). But a mere vague intimation by a party of his future intentions is no evidence of a promise of marriage (*u*). The statute 32 & 33 Vict. c. 68, which enables the parties to an action for breach of promise of marriage to be called as witnesses, also provides that the plaintiff's evidence must be corroborated by some other material evidence in support of the promise (*x*).

Time of performance.—If the marriage is appointed to take place at a remote and unreasonably distant time, the contract would be voidable at the option of either of the parties, as being in restraint of matrimony (*post*, 1139). If no time is fixed and agreed upon for the performance of the contract, it is, in contemplation of law, a contract to marry within a reasonable period after request; and either of the parties may call upon the other to fulfil the engagement, and, in case of default, may bring an action for damages. If both parties lie by for an unreasonable period, and do not treat the contract as a continuing contract, the engagement will be deemed to be abandoned by mutual

(*q*) *Harvey* v. *Johnston*, 17 L. J. C. P. 298.

(*r*) *Hutton* v. *Mansell*, 6 Mod. 172.

(*s*) *Daniel* v. *Bowles*, 2 C. & P. 553. *Il n'est pas toujours nécessaire que ce consentement soit exprès. Lorsqu'un père fiance sa fille à quelqu'un, la fille, qui est présent, et qui ne contredit à ce que fait son père, est censée consentir tacitement aux fiançailles.* Poth. Marriage, Part 2, ch. 1, No. 30. *Quæ patris voluntati non repugnat, consentire intelligitur.* Dig. lib. 23, tit. 1, l. 12.

(*t*) *Potter* v. *Deboos*, 1 Stark. 8?.

(*u*) *Cole* v. *Cottingham*, 8 C. & P. 75.

(*x*) As to what is "material evidence in support of the promise," see *Bessela* v. *Stern*, 2 C. P. D. 265.

consent. The Roman law very properly considered the term of two years amply sufficient for the duration of a betrothment (y). If the time of performance is fixed, and, by bodily disease, it becomes impossible for one party to go through the ceremony without danger to health, this is a valid ground for postponement of performance, on giving notice to the other party (z). If either of the parties puts it out of his or her power to fulfil the contract, by marrying somebody else, there is a breach of the engagement; and a right of action at once attaches. If in such a case the contract was a contract to marry on request, no request need be made, as the defendant by his conduct has dispensed with the necessity of it, and rendered it useless (a). So, if there is a promise to marry at a fixed time, and before the time arrives one of the parties absolutely refuses to fulfil the promise, there is a breach, for which an action will lie at once (b).

Excuses for non-performance.—If the party making the promise was married at the time it was made, and was consequently incapable of entering into the contract or of performing it, the incapacity constitutes no excuse for non-performance, unless it was known to the other contracting party at the time the promise was made and accepted (c). Previous insanity and confinement in a lunatic asylum constitute no excuse for non-performance of a promise of marriage (d). Notwithstanding a promise of marriage proved, if a man has conducted himself in a brutal or violent manner, and threatened to use a woman ill, she has a right to say she will not commit her happiness to such keeping (e).

Conditional promises of marriage.—If a man promises to marry a woman if she will come from America to England and marry him, or will do any other particular act or thing, there is a sufficient consideration for the promise; and, if the condition precedent is accomplished, if, for instance, the voyage is performed, or the act done, and the woman is ready, and willing, and able to be married to the man, he is responsible for the non-fulfilment of his promise. The validity of conditional promises of marriage will depend upon the reasonableness of the condition and the time limited for its accomplishment. If the marriage is to depend upon the happening of a distant and uncertain event, which may, in all probability, not take place during the lives of

(y) Cod. lib. 5, tit. 1, l. 2.

(z) *Hall* v. *Wright*, Ell. Bl. & Ell. 759.

(a) *Short* v. *Stone*, 8 Q. B. 358; *Lovelock* v. *Franklyn*, ib. 378; 15 L. J. Q. B. 145.

(b) *Frost* v. *Knight*, L. R. 7 Ex. 111; 41 L. J. Ex. 78.

(c) *Wild* v. *Harris*, 7 C. B. 1004; *Millward* v. *Littlewood*, 20 L. J. Ex. 2; 5 Exch. 775.

(d) *Baker* v. *Cartwright*, 10 C. B. N. S. 124; 30 L. J. C. P. 364.

(e) *L[illegible]ds* v. *Cook*, 4 Esp. 257.

the parties, it would be a contract in restraint of marriage. If the condition is a lawful condition, the liability attaches as soon as the condition has been accomplished (*f*). If it is stipulated that the girl shall have a certain marriage portion, or that the man shall make a certain settlement, the liability upon the contract does not attach until the condition has been accomplished. And, if a reverse of fortune prevents one of the parties from fulfilling the engagement in respect of the portion or the settlement, the other is discharged.

Fraudulent concealment of material circumstances—Misrepresentation and deceit.—It is no answer to an action for a breach of promise of marriage to show that the plaintiff at the time of the making of the promise was engaged to marry some one else; and that the pre-engagement was concealed from the defendant. A party is not bound in all cases to disclose such a fact; but the concealment of it might, under certain circumstances, amount to a fraud (*g*). Neither is a party bound to disclose that at some previous period of his life he was of unsound mind, and had been confined in a lunatic asylum (*h*). If a woman at the time of the betrothment was a woman of loose and immodest character, and this was unknown at the time to the man who promised to marry her, the latter is entitled, as soon as he discovers her real character, to break off the engagement. General reputation of want of chastity must be established in such a case (*i*); or, if particular instances of misconduct are relied upon, they must be fully proved. If the circumstances, whatever they may be, were known to the other contracting party, there is then no fraud or deceit in the matter, and he has no ground for refusing to complete his engagement (*k*). If false representations are made by a girl, or by her friends in collusion with her, as to her circumstances and situation in life, and the amount of her fortune and marriage portion, the fraud is an answer to any action that may be brought for a breach of the promise of marriage (*l*). But, if the plaintiff herself was no party to the fraud, and made no false representation, and was guilty of no wilful suppression of the truth, the defendant cannot escape from liability.

Transfer of property by the lady after a promise of marriage.—If, after the mutual promises of marriage have been exchanged, the woman makes any conveyance or disposition of any

(*f*) *Harvey* v. *Johnson*, 17 L. J. C. P. 298.

(*g*) *Beachey* v. *Brown*, Ell. Bl. & Ell. 796; 29 L. J. Q. B. 105.

(*h*) *Baker* v. *Cartwright*, 10 C. B. N. S. 124.

(*i*) *Foulkes* v. *Sellway*, 3 Esp. 236.

(*k*) *Irving* v. *Greenwood*, 1 C. & P. 350; *Young* v. *Murphy*, 3 Sc. 379; 3 Bing. N. C. 54; *Bench* v. *Merrick*, 1 Car. & Kirw. 467.

(*l*) *Wharton* v. *Lewis*, 1 C. & P. 529.

considerable portion of her property without her intended husband's knowledge and concurrence, this is a deception upon the latter, which entitles him to withdraw from the engagement as soon as he is made aware of the circumstance. And, if nothing has been said or agreed upon at the time of the betrothment respecting the settlement to be made on the marriage, and the lady insists on making a settlement of her own private fortune to her separate use, free from the dominion and control of her intended husband, the latter is entitled, if he disapproves of the arrangement, to withdraw from the contract, and to say that he will not marry her upon such terms.

Accidents and mishaps altering the condition of either of the parties.—If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease, accident, or mutilation, becomes impotent, he could never maintain an action against a lady for refusing to marry him (*m*).

Abandonment of the contract.—Parties who have exchanged mutual promises of marriage may, of course, at any time before the contract is carried into effect by the performance of the marriage ceremony, dissolve the engagement by mutual consent. *Quæ consensu contrahuntur, contrario consensu dissolvuntur* (*n*).

Breach of promise of marriage.—In an action for breach of promise of marriage, wherein it is laid as special damage, that the defendant debauched the plaintiff and ruined her character, it would be misdirection to tell the jury that they might give her damages as a *solatium* for the injured feelings of her parents and family; but, where the defendant is a person of property, they may take into their consideration, not only the plaintiff's pecuniary loss in not becoming his wife, but the injury done to her future prospects of marriage, her injured feelings and affections, and the mortification she must suffer in not being able to look her family in the face. In such an action the damages cannot be measured by a known standard, as in commercial cases, but the amount is peculiarly a question for the jury; and, where no witnesses were called for the defendant, and it appeared that imputations had been cast upon the plaintiff, a person in humble life, and her

(*m*) *Hall* v. *Wright*, Ell. Bl. & Ell. 763; 29 L. J. Q. B. 43.

(*n*) *King* v. *Gillett*, 7 M. & W. 55; Poth. Tr. du Mar. No. 55; as to evidence of exoneration and discharge from the contract, see *Davis* v. *Bomford*, 30 L. J. Ex. 139.

witnesses, which failed, and the jury gave 2,500*l.* damages against the defendant, who was a person of property, and a new trial was asked for simply upon the ground that the damages were excessive, the application was refused (*o*). As to ratification of a promise by a minor, see *ante*, p. 126.

Promises of portions and settlements.—A promise to give a girl a specific sum on her marriage, or to pay money to either the intended husband or wife, or settle property upon them, or either of them in the event of their marrying, creates a binding obligation in the eye of the law; for "marriage is one of the strongest considerations in the law to found a contract, gift, or grant" (*p*). But the promise must be made by a person of full age, and must not be the expression of a mere desire or wish to make a settlement (*q*). It must also be authenticated, as we have before seen, by a note in writing, signed by the promisor or his agent (*r*). If, therefore, the husband, prior to the marriage, gives a verbal promise to the wife that he will settle her property upon her, she has nothing to rely upon but his honour; and, if, after the marriage, he breaks his word, she has no remedy against him (*s*). Subsequent marriage is not part performance of a parol contract in consideration of marriage; nor will acts of part performance by the party sought to be charged prevent the operation of the statute (*t*). But, if a husband writes a letter promising to make a settlement upon his intended wife, or a father, by a letter, promises "to give such a fortune with his daughter to one who shall marry her," this is a sufficient compliance with the requirements of the statute. But the promise must be an absolute promise, and not dependent upon conditions and contingencies remaining unaccomplished (*u*). Where a person by writing promised, as a mark of esteem and friendship to a young man, that he would allow him 500*l.* a-year, and at his death bequeath him 10,000*l.*, and this writing was shown to the parent of a young woman, who thereupon gave consent to the marriage, it was held to be a mere *nudum pactum*, for that there was no connection between the promisor and the parent (*x*).

Ante-nuptial settlements by women engaged to be married may be made with the knowledge and concurrence of the intended

(*o*) *Berry* v. *Da Costa*, L. R. 1 C. P. 331; 35 L. J. C. P. 191.

(*p*) *Laver* v. *Fielder*, 32 Beav. 1; 32 L. J. Ch. 365.

(*q*) *Beaumont* v. *Carter*, 32 Beav. 586; *Moorhouse* v. *Colvin*, 15 Bea. 341.

(*r*) *Ante*, p. 169; *Randall* v. *Morgan*, 12 Ves. 73; *Bawdes* v. *Amhurst*, Pr. Ch. 404; *Barkworth* v. *Young*, 26 L. J. Ch. 157; *Caton* v. *Caton*, L. R. 2 H. L. 127; 36 L. J. Ch. 886.

(*s*) *Montacute* v. *Maxwell*, 1 P. Wms. 620; *Caton* v. *Caton*, L. R. 1 Ch. 137; 35 L. J. Ch. 292; but see *Williams* v. *Williams*, 37 L. J. Ch. 854.

(*t*) *Caton* v. *Caton*, L. R. 1 Ch. 137; 35 L. J. Ch. 292.

(*u*) *Bird* v. *Blosse*, 2 Ventr. 361; *Moore* v. *Hart*, 1 Vern. 110; *Alt* v. *Alt*, 4 Giff. 84; 32 L. J. Ch. 52.

(*x*) *Dashwood* v. *Jermyn*, 12 Ch. D. 776.

husband. If the woman is in trade, she may convey her stock-in-trade to trustees, to enable her to carry on the business separately from the husband; and, if the latter does not intermeddle with the business, the stock-in-trade will not be liable to be seized for his debts (*y*). If the woman is a minor, no deed executed by her without the sanction and authority of the Lord Chancellor can bind her, nor can she confirm or ratify the deed after she comes of age (*z*), although the deed, if executed by her husband, will be binding upon him. If she neglects to inform her intended husband of her intention to make the settlement, it will in general be considered to have been made in fraud of his marital rights; and the court will set it aside (*a*). A settlement made by a widow of certain property upon the children of a former marriage, during the pendency of a treaty for a second marriage, is fraudulent and void as against the second husband, if he was not informed of the circumstance prior to the celebration of the nuptials (*b*). But, if a widow has done nothing more than make a fair and reasonable provision for her children, such as every mother in her situation would morally be bound to make, it has been said that there is no fraud in the case, and no ground for setting aside the settlement (*c*). If the settlement has been made prior to the treaty of marriage, there is no ground for impeaching it. And if, during the betrothment, the woman announces her intention of making the settlement to her intended husband, and the nuptials are celebrated, the settlement will stand good (*d*). A husband has no right to disturb a secret settlement made by the wife pending the treaty for the marriage, provided he has by his conduct before marriage put it out of the power of the wife effectually to make any stipulation for the settlement of her property by rendering retirement from the marriage on her part impossible. Thus, where a man seduced a girl during the betrothment, and brought her to his house to cohabit with him, and the girl during the cohabitation made a settlement of her own fortune to the separate use of herself for life, with remainder to her children in equal shares, to the exclusion of any future husband, and was subsequently married to the man with whom she

(*y*) *Jarman* v. *Wolloton*, 3 T. R. 618; *Haslington* v. *Gill*, 3 Doug. 415; *Dean* v. *Brown*, 8 D. & R. 95; 5 B. & C. 336; settlements of goods and chattels require registration; *Fowler* v. *Foster*, 28 L. J. Q. B. 210.

(*z*) 37 & 38 Vict. c. 62, s. 2.

(*a*) *Howard* v. *Hooker*, 2 Ch. R. 44; *Lance* v. *Norman*, ib. 41; *Prideaux* v. *Lonsdale*, 1 De G. J. & S. 433; *Downes* v. *Jennings*, 32 Beav. 290; 32 L. J. Ch. 643; *Carleton* v. *Earl of Dorset*, 2 Vern. 17; *Goddard* v. *Snow*, Russ. 485; *Chambers* v. *Crabbe*, 34 Beav. 457.

(*b*) *England* v. *Downs*, 2 Beav. 529.

(*c*) *Hunt* v. *Matthews*, 1 Vern. 408; *Doe* v. *Lewis*, 11 C. B. 1035; but see *per* Romilly, M. R., *Downes* v. *Jennings*, 32 Beav. 290; 32 L. J. Ch. 643, 646.

(*d*) *Strathmore* v. *Bowes*, 2 Cox, 34; 2 Br. C. C. 350; *St. George* v. *Wake*, 1 Myl. & K. 617; *Cotton* v. *King*, 2 P. Wms. 674; *Blithe's case*, 2 Freem. 91.

had cohabited, the court refused to set aside the settlement, saying that the woman committed no fraud upon the husband, if, when placed under such circumstances, she took the only means she had left her of protecting herself (*e*).

Ante-nuptial settlements by intended husband and wife.—Property intended to be settled is generally, prior to the marriage, conveyed to trustees, to be holden by them, either for the separate use of the wife, free from the control of the husband, or for the use of the husband and wife jointly, and subsequently of the children of the marriage, with ultimate limitations and provisions, in case there should be no issue. All ante-nuptial settlements, made *bonâ fide* in contemplation of the marriage, are good, both against the husband, and his creditors, and all subsequent purchasers of the property settled (*f*). Therefore, whenever it is wished to secure a provision for the wife and children which shall remain unaffected by the subsequent insolvency of the husband, the arrangements should be made before marriage, as great difficulties are likely to interpose themselves in the way of an effectual settlement after marriage. If a general power of revocation is reserved in a settlement of realty, or if the exercise of such a power is made to depend upon the consent of persons under the influence and control of the husband, the settlement cannot be supported against creditors nor against subsequent purchasers (See Add. on Torts, 5th ed. by Cave, p. 220, *et seq.*). If the husband reserves to himself the power of charging the land to "the full value," this reservation is tantamount to a general power of revocation, and invalidates the settlement (*g*). But powers to sell and exchange lands, and re-invest monies and securities with the consent of trustees, and the usual powers of charging lands to a moderate amount, given *bonâ fide,* will not defeat the settlement. If a settlement is made by parties intending to marry, and who afterwards marry, the settlement cannot be revoked before marriage by the intended husband and wife without the consent of the trustees and all the parties to the settlement (*h*). A marriage settlement made in London in the Scotch form by parties intending to be married, one of whom is at the time domiciled in Scotland, will be construed in England according to the law of Scotland (*i*). If the marriage on which the settlement is founded is void, the settlement is void likewise (*j*).

Marriage settlements by infants.—If both the parties to a marriage settlement are infants, the settlement is entirely

(*e*) *Taylor* v. *Pugh*, 1 Hare, 608, 616.
(*f*) *Campion* v. *Cotton*, 17 Ves. 263.
(*g*) *Tarback* v. *Marbary*, 2 Vern. 510.
(*h*) *Page* v. *Horne*, 17 L. J. Ch. 200.
(*i*) *Duncan* v. *Canaan*, 23 L. J. Ch. 265; as to covenants to settle after acquired property, see *Gray* v. *Stuart*, 30 L. J. Ch. 884.
(*j*) *Chapman* v. *Bradley*, 33 Beav. 65.

nugatory, unless it has been made under the sanction and with the authority of the Lord Chancellor, pursuant to the provisions of the 18 & 19 Vict. c. 43; nor can the parties confirm the settlement after they come of age (*k*). If the female party is under age, all the general personal estate of the female infant comprised in the settlement will be bound thereby, because it becomes by the marriage the absolute property of the husband; but the real estates of inheritance of the female infant are not bound by the settlement, as she has no power of disposition over them during her minority. If she survives the husband her power over her real estate is the same as if no settlement had ever been made. If the husband survives, he holds such real property for his life, if he had issue by the wife born during the coverture which might by possibility inherit the estate as her heirs; and on his death it descends to the wife's heir at law, whatever may be the terms and provisions of the settlement (*l*). The 18 & 19 Vict. c. 43, renders valid a post-nuptial settlement of an infant's estate made with the approbation of the Court of Chancery (*m*). Where a woman marries while an infant, her land which she has in fee simple or leasehold property is settled estate under the Conveyancing and Law of Property Act, 1881 (*n*), and her trustees stand possessed of the accumulated fund arising from income of the land and from investments of income in trust for her separate use independently of her husband.

Settlements of after-acquired property.—A covenant by the husband alone to settle all property which may accrue to the wife during coverture does not extend to property left to the wife to be at her absolute disposal, free from the control of her husband (*o*). But, if the wife, or the husband and wife before marriage, have entered into a covenant of this description, the husband is responsible for its fulfilment; and such a covenant may be specifically enforced (*p*); but it does not bind property settled to the separate use of the wife, so that she has no power of disposition over it (*q*), nor property bequeathed to husband and wife jointly (*r*). And, if the covenant to settle the after-acquired property of the wife is on the part of the husband only, the wife is not bound by it (*s*). Such a covenant is construed to apply only to property acquired during the coverture, although the words "during the coverture" are not inserted in the covenant (*t*).

(*k*) 37 & 38 Vict. c. 62, s. 2.

(*l*) *Simson* v. *Jones*, 2 Russ. & M. 376; *Trollope* v. *Linton*, 1 Sim. & Stu. 485; *Stamper* v. *Barker*, 5 Mad. 164; *Milner* v. *Ld. Harewood*, 18 Ves. 259.

(*m*) *Powell* v. *Oakey*, 34 Beav. 575.

(*n*) 44 & 45 Vict. c. 41, s. 41, 42 (5).

(*o*) *Travers* v. *Travers*, 2 Beav. 179; *Ramsden* v. *Smith*, 2 Drew. 302.

(*p*) *Milford* v. *Peile*, 2 W. R. 181; *Butcher* v. *Butcher*, 14 Beav. 222; Peachey on Settlements, p. 526.

(*q*) *Coventry* v. *Coventry*, 32 Beav. 612.

(*r*) *Edye* v. *Addison*, 1 H. & M. 781; 33 L. J. Ch. 132.

(*s*) *Young* v. *Smith*, L. R. 1 Eq. 180; 35 Beav. 87.

(*t*) *Carter* v. *Carter*, L. R. 8 Eq. 551;

Post-nuptial settlements by the husband of his own property or by the husband and wife of the wife's property, are valid as between the parties to them (*u*); but they will not prevail over the claims of subsequent purchasers of the settled property, although they bought with knowledge of the settlement (*x*), unless it has been made pursuant to an agreement in writing (*y*), entered into with the wife, or her guardians, prior to the marriage, or unless the husband has surrendered his interest in the wife's estate for the sole and exclusive benefit of the wife during coverture (*z*). Nor will they prevail over the claims of creditors, if it appear that the husband was largely indebted at the time he made it (*a*). If the debt of a creditor, by whom a voluntary settlement is impeached, existed at the date of the settlement, and it is shown that his remedy is defeated or delayed, it is immaterial whether the debtor was or was not solvent after the making of the settlement. But, if a voluntary settlement is impeached by a subsequent creditor whose debt was not contracted at the date of the settlement, it must be shown that the necessary result of the settlement was to delay, hinder, and defraud the creditors, in which case the law will infer that the settlement was made with that intent (*b*); and, although a husband may not be in debt at the time he makes the settlement, yet, if the settlement is made long after marriage, and not in pursuance of any agreement to make a settlement prior to the marriage, nor in consequence of an accession to the wife's fortune, and the husband becomes indebted to any considerable extent immediately afterwards, the settlement would be considered fraudulent. But it will be otherwise, if the husband received property from the wife at the time of the marriage, and made the post-nuptial settlement as a fair and equitable provision for her, he being at the time in solvent circumstances (*c*); or if the settlement contains a provision for the payment out of the settled property of the husband's debts (*d*). If the husband, after marriage, conveys his furniture, stock, and moveables, to trustees, for the use of his wife and children, and remains, notwithstanding such conveyance, the apparent possessor

39 L. J. Ch. 268; *In re Edwards*, L. R. 9 Ch. 97.

(*u*) *Merryweather* v. *Jones*, 4 Giff. 503.

(*x*) *Gooch's case*, 5 Co. 60, a.; *Evelyn* v. *Templar*, 2 Br. C. C. 148; *Doe* v. *Manning*, 9 East, 59; *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84; *Buckle* v. *Mitchell*, *ib.* 110; *Johnson* v. *Legard*, 6 M. & S. 60; *Peter* v. *Nicolls*, L. R. 11 Eq. 391.

(*y*) *Goldicutt* v. *Townsend*, 28 Beav. 445.

(*z*) *Hewison* v. *Negus*, 22 L. J. Ch. 955; *In re Foster and Lister*, 6 Ch. D. 87.

(*a*) *Took* v. *Tuck*, 12 Moore, 435; *Townsend* v. *Windham*, 2 Ves. sen. 11.

(*b*) *Freeman* v. *Pope*, L. R. 5 Ch. 538; 39 L. J. Ch. 689; *Bolland, ex parte*, L. R. 7 Ch. 24.

(*c*) *Re Hanlon*, 23 Law T. R. 212; *Lush* v. *Wilkinson*, 5 Ves. 384; *Battersbee* v. *Farrington*, 1 Swanst. 106; *Holloway* v. *Millard*, 1 Mad. 419; *Nunn* v. *Wilsmore*, 8 T. R. 529.

(*d*) *George* v. *Milbanke*, 9 Ves. 194.

and owner of the property, the conveyance so made is *primâ facie* a fraud, as regards creditors (*e*). But the possession by the husband and wife of property, stock-in-trade, and furniture, limited to the separate use of the wife before marriage, is no badge of fraud, and does not render it liable to be seized for the husband's debts (*f*). Where an attorney, being in insolvent circumstances, assigned the good-will of his business in consideration of a sum of money paid down, and an annuity, secured by bond, to be paid to his wife for life, with remainder to himself for life, it was held that the settlement of the annuity was void as against creditors. "This," observes Wood, V.C., "is in effect a contract by which the debtor is making sale of his property by means of a covenant that he will abstain from carrying on business, and taking a settlement of the purchase-money upon his wife for life for her separate use, with the immediate remainder to himself for life, the whole object plainly being to obtain the benefit of the entire property for his own use and advantage" (*g*). An ante-nuptial settlement is voluntary so far as it is made in favour of collaterals (*h*).

Post-nuptial settlements in fulfilment of an ante-nuptial contract in writing (*i*) will prevail against the claims both of creditors and purchasers (*k*). And so also will a settlement made by the husband in consequence of the relinquishment by the wife of her jointure, or dower, or property over which she has a power of disposition or appointment (*l*), or made in consideration of a new portion, or addition to her portion, to be given to the wife by her relations (*m*). But the amount and value of the property so settled must not be greatly disproportioned to the value of the consideration received by the husband, or the transaction will, if the husband is indebted at the time, or shortly afterwards becomes insolvent, be considered fraudulent, and the husband's creditors will be let in. A wife may contract in equity with her husband for a post-nuptial settlement upon her of her own property for a valuable consideration, and the husband may be a purchaser from the wife where property belonging to her is the subject of the settlement, so that, if the settlement is a bargain for value

(*e*) See Add. on Torts, 5th ed. by Cave, p. 223; *Arundel* v. *Phipps*, 10 Ves. 139.

(*f*) *Jarman* v. *Woolloton*, 3 T. R. 618; *Cadogan* v. *Kennett*, 2 Cowp. 436; *Hasclinton* v. *Gill*, *ib.* 620, n.; 3 Doug. 415.

(*g*) *Neale* v. *Day*, 28 L. J. Ch. 45; *French* v. *French*, 6 De G. M. & G. 102.

(*h*) *Smith* v. *Cherril*, L. R. 4 Eq. 390; 36 L. J. Ch. 738.

(*i*) *Goldicutt* v. *Townsend*, 28 Beav. 445.

(*k*) *Dundas* v. *Dutens*, 1 Ves. jun. 196.

(*l*) *Ward* v. *Shallett*, 2 Ves. sen. 17; *Anon.*, Pre. Ch. 102; *Cottle* v. *Fripp*, 2 Vern. 220.

(*m*) *Rassel* v. *Hammond*, 1 Atk. 13; *ib.* 190; *Colvile* v. *Parker*, Cro. Jac. 158; *Ramsden* v. *Hylton*, 2 Ves. sen. 308; *ib.* 18; *Jones* v. *Marsh*, Cases Eq. Talbot, 64; *Wheeler* v. *Caryl*, Amb. 121.

between the husband and wife, it is sustainable against creditors (*n*). The 18 & 19 Vict. c. 43, renders valid a post-nuptial settlement of an infant's estate, made with the approbation of the Court of Chancery (*o*).

Of the wife's right to a post-nuptial settlement.—If, after the marriage, the wife is unable to live with the husband in consequence of his misconduct, she has a right, as against him, to have her own property and unrecovered *choses in action* settled upon her (*p*). She has a right also, in certain cases, to a settlement upon her of her own property, as against the assignees of the husband in bankruptcy, and even against a particular assignee claiming under an assignment from both the husband and wife for a valuable consideration (*q*).

Contracts in fraud of settlements and promises of marriage portions.—Any private underhand agreement or treaty entered into for the purpose of infringing or defeating an open, public agreement, made in consideration of marriage, is fraudulent and void (*r*). A bond, for example, given by the husband to return part of his wife's marriage portion, without the privity of his own parents and guardians, and of all the parties to the treaty of marriage, is fraudulent and void, and cannot be enforced against him. If the father, or any other relation or friend of the husband or wife, who has agreed to make a settlement of property upon one or both of them on their marriage, or to give a marriage portion to the wife, takes a bond or covenant from either the husband or wife, or both of them, to re-pay the whole or any part of such marriage portion, or to re-convey an estate granted or intended to be granted, the contract is void, as being a fraud upon the parties to the treaty of marriage, and upon the parents and guardians who had a right to give or withhold their consent to the marriage (*s*).

If the relations of a woman furnish her with money, in order that she may appear to have a considerable marriage portion, and secretly take from her a bond or covenant to re-pay the money advanced after her marriage, the bond is void (*t*). So, if a relation or friend of the husband advances him money, or clothes him with the apparent possession of property, to enable him to

(*n*) *Hewison* v. *Negus*, 22 L. J. Ch. 655; *Harman* v. *Richards*, *ib.* 1066.

(*o*) *Powell* v. *Oakley*, 34 Beav. 574.

(*p*) *Barrow* v. *Barrow*, 24 L. J. Ch. 198.

(*q*) *Scott* v. *Spashett*, 3 Mac. & Gord. 603; *Dunkley* v. *Dunkley*, 2 De G. Mac. & G. 390; *Re Kincaid*, 22 L. J. Ch. 395.

(*r*) *Kemp* v. *Coleman*, 1 Salk. 156; *Turton* v. *Benson*, 2 Vern. 764; *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 380; 1 Ves. sen. 277.

(*s*) 1 Eq. Abr. 88, E. 3; *Peyton* v. *Bladwell*, 1 Vern. 240; *Scott* v. *Scott*, 1 Cox, 367; *Palmer* v. *Neave*, 11 Ves. 165; *Morrison* v. *Arbuthnot*, 8 Br. P. C. 247; 1 Br. Ch. C. 548, n.

(*t*) *Gale* v. *Lindo*, 1 Vern. 475.